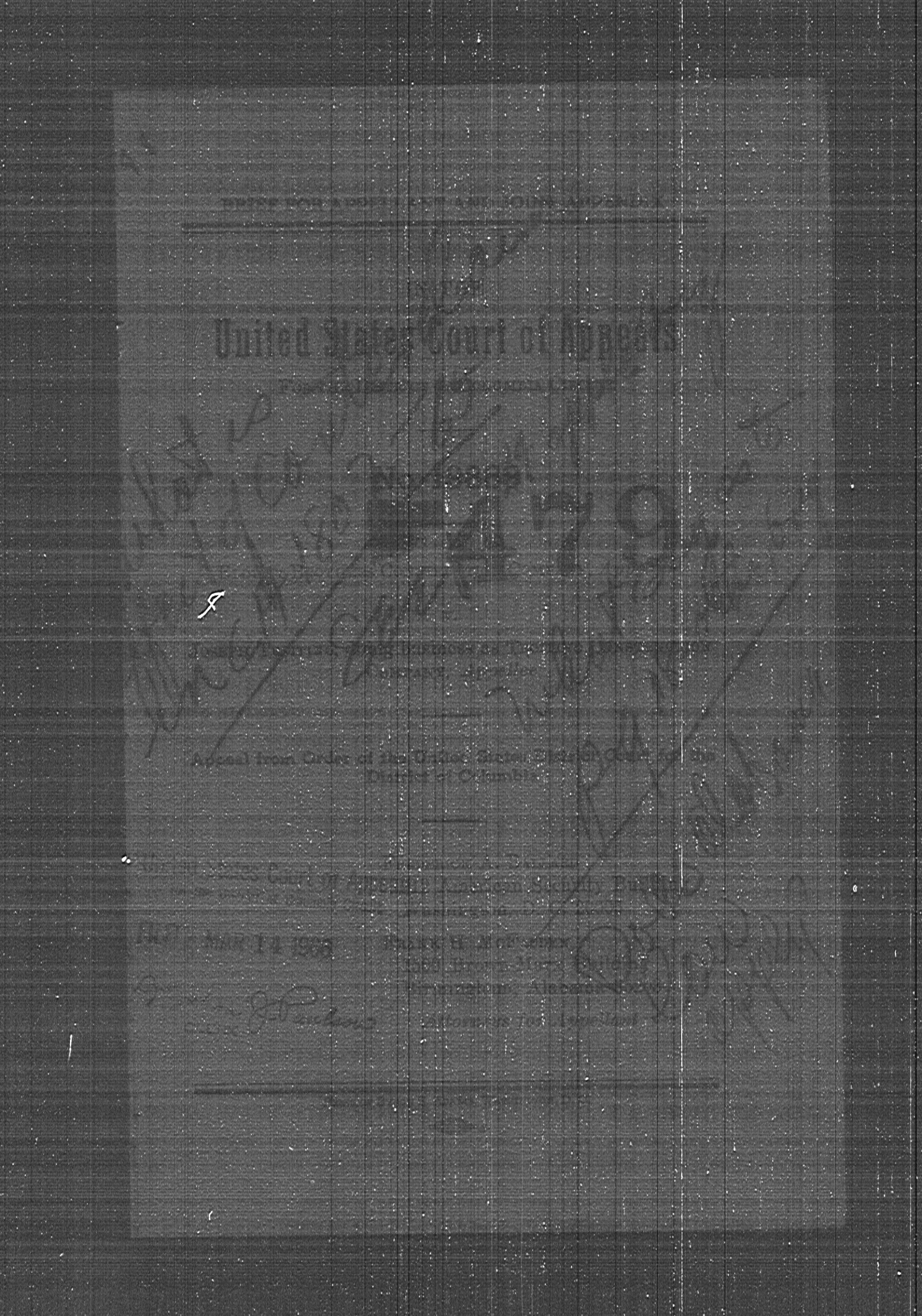
United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD



STATEMENT OF QUESTION PRESENTED

The question is whether the District Court erred in refusing, on unstated grounds, to enforce under the United States Arbitration Act (Title 9, U. S. Code) an arbitration agreement contained in a subcontract relating to heavy construction in the District of Columbia, and involving substantial interstate commerce, where the arbitration agreement embraces "any question of fact" and the dispute relates primarily to the subcontractor's alleged delay in performance.

INDEX TO BRIEF

CASES

* Cases and authorities chiefly relied upon are marked by asterisks.

STATUTES

INDEX TO JOINT APPENDIX

* Cases and authorities chiefly relied upon are marked by asterisks.

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19889

BLOUNT BROTHERS CONSTRUCTION COMPANY, *Appellant*

v.

JOSEPH TROITINO, doing business as TROITINO CONSTRUCTION COMPANY, *Appellee*

Appeal from Order of the United States District Court for the District of Columbia

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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

The District Court had jurisdiction of the civil action under Title 28, United States Code, section 1332, and Title 11 District of Columbia Code, sections 305 and 306. The District Court had jurisdiction of defendant's motion to enforce the arbitration agreement under the United States Arbitration Act, Title 9 United States Code, and specifically sections 3 and 4 thereof.

This court has jurisdiction under Title 28 United States Code, section 1292(a)(1); see *Carey* v. *Carter*, 120 U.S. App. D.C. 182, 344 F. 2d 567 (1965).

STATEMENT OF THE CASE

Defendant,[1] Blount Brothers Construction Company, on November 3, 1960, entered into a contract with the District of Columbia for construction of a portion of the extensive highway and railroad-trestle development in southwest Washington known as the Southwest Freeway. This development is an integral part of the interstate highway and railway systems along the eastern seaboard (J.A. 10). By subcontract of April 20, 1961 (J.A. 14) Plaintiff, Troitino Construction Company, agreed to furnish and install the stonework provided for by the prime contract. Performance of both the prime and of this subcontract involved substantial transportation of materials in interstate commerce (J.A. 13-14).

Article XIII of the subcontract provides as follows:

> "If any question of fact shall arise under this contract and there is no provision for settlement in the General Contract, then either party hereto may demand an arbitration by reference to a board of arbitration, to consist of one person selected by Contractor, and one person selected by Subcontractor, and these two to select a third; and in case these two shall fail to select a third within three days, either party hereto shall have the right to request that the third arbitrator be named by the American Arbitration Association. In case either party fails to name an arbitrator within three days after requested to do so, then the other party shall have the right to request the American Arbitration Association to name an arbitrator to represent the party so failing to name one. The written decision of any two of this Board shall be final and binding on both parties hereto. Each party shall pay one-half of the expense of such reference."

[1] The parties will be referred to by their designations in the lower court.

The completion date contained in the prime contract was 730 calendar days after the issuance by the contracting officer to defendant, as prime contractor, of a notice to proceed. Plaintiff failed to complete the stonework within the time schedules applicable under the subcontract. This failure seriously delayed the completion of the prime contract, resulting in allegedly substantial damage to defendant, the prime contractor, and in the withholding by defendant of money which might otherwise have been due to plaintiff.

After the subcontract was completed, and while settlement discussions were in progress, the action below was filed by plaintiff, the subcontractor (Complaint, J.A. 5). Thereupon defendant, in a timely manner, demanded arbitration pursuant to Article XIII of the subcontract (J.A. 26), and filed a motion pursuant to the United States Arbitration Act (9 U.S.C.) to enforce the arbitration agreement, with an accompanying stay of the civil action (J.A. 7). On July 20, 1965, the District Court (Judge Youngdahl) denied the motion without prejudice, the order stating:

> "* * * it appearing to the Court that the defendant has not made a sufficient showing that the above civil action contains an 'issue referable to arbitration' and that fact not appearing elsewhere in the file of the case; and it further appearing that the defendant has not made a showing that the contract sued upon embraces a transaction involving commerce within Section 2 of the Federal Arbitration Act, that issue having been raised in opposition to this motion * * *." (J.A. 7)

Pursuant to the above order defendant filed a supplemental motion to which was attached an affidavit of defendant's general counsel, Frank H. McFadden, outlining the nature of the issues involved (J.A. 11), and affidavits of defendant's officers John A. Caddell and Thad H. Pruett, relating to the degree of interstate transportation of persons

and material involved in the performance of the contract and subcontract (J.A. 10, 12). The supplemental motion was denied by the court (Judge McGarraghy), on unstated grounds, by order of November 5, 1965 (J.A. 30). Thereupon defendant filed its answer and counterclaim (J.A. 31) expressly reserving its demand for arbitration (J.A. 32-3), and simultaneously moved for rehearing (J.A. 31). The motion for rehearing was denied on November 23, 1965 (J.A. 35). This appeal followed.

STATUTES INVOLVED

United States Arbitration Act (Title 9 U.S. Code):

"§ 1. *'Maritime transactions' and 'commerce' defined; exceptions to operation of title*

* * *

" 'commerce', as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation * * *."

"§ 2. *Validity, irrevocability, and enforcement of agreements to arbitrate*

"A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

"§ 3. *Stay of proceedings where issue therein referable to arbitration*

"If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration."

"§ 4. *Failure to arbitrate under agreement; petition to United States Court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination*

"A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. * * *"

* * * * *

"§ 6. *Application heard as motion*

"Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided."

STATEMENT OF POINTS

Appellant relies on the following points:

1. The court below erred in denying defendant's Motion to Enforce Agreement for Arbitration and for Stay of Further Proceedings Pending Arbitration, as supplemented by the supplemental motion to the same effect.

2. The court below erred in failing to find that this action involves issues referable to arbitration under the contract between the parties.

3. The court below erred in failing to find that the contract between the parties involved "commerce" within the meaning of the United States Arbitration Act (9 U.S.C. secs. 1, 2).

SUMMARY OF ARGUMENT

The motion to enforce the arbitration agreement which was denied below, on unstated grounds, was an orthodox motion to enforce an explicit arbitration agreement contained in a construction contract which is shown by the record to involve substantial interstate commerce. The enforcement of such agreements has been taken for granted in this jurisdiction, and no doubt elsewhere. The court below made no findings of fact or conclusions of law, and did not state orally the grounds for the denial of the motion as supplemented. The only indication of possible grounds was that contained in the court's order denying without prejudice the original motion, which order stated that

> "defendant has not made a sufficient showing that the above civil action contains an 'issue referable to arbitration' * * *; and it further appearing that the defendant has not made a showing that the contract sued upon embraces a transaction involving commerce within Section 2 of the Federal Arbitration Act * * * (J.A. 7).

The affidavits and other material attached to the supplemental motion (J.A. 10-30) clearly satisfied both of the deficiencies originally found by the court. There was no other reason not to enforce the arbitration agreement.

ARGUMENT

I.

The Contract Between the Parties Involved "Commerce" Within the Meaning of the United States Arbitration Act

One of the two questions as to which the original order below (J.A. 7) directed amplification of the record was whether "commerce" was involved within the meaning of the Arbitration Act. The Act applies to "a contract evidencing a transaction involving commerce" 9 U.S.C. sec. 2; and the Act defines "commerce" as including

> "Commerce among the several states or with foreign nations or in any territory of the United States or *in the District of Columbia* * * *." (Emphasis supplied) (id. sec. 1).

The italicized words are explicit and seem to leave no need for interpretation. The corresponding definition in the Labor Management Relations Act (29 U.S.C. sec. 152(6)) is substantially the same; it applies to commerce "within" the District of Columbia, rather than "in", but this variation appears immaterial. The latter statute has been held by this Court to apply to a District of Columbia hospital. *National Labor Relations Board* v. *Central Disp. & E. Hosp.*, 79 U.S. App. D.C. 274, 145 F. 2d 852 (1944), cert. den. 324 U.S. 847. Certainly it would apply to heavy construction.

Moreover, this contract clearly concerns "commerce among the several states". Both the general contract and the subcontract involved interstate commerce directly and substantially. (See the affidavits of John A. Caddell, J.A. 10, and Thad H. Pruett, J.A. 12). In nearly identical situations two courts of appeal have held specifically that the presence of such interstate elements in the performance

of construction contracts satisfied the "commerce" jurisdictional requirement of the United States Arbitration Act. *Monte* v. *Southern Delaware County Authority,* 321 F. 2d 870 (C.A. 3, 1963); *Metro Industrial Painting Corp.* v. *Terminal Const. Co.,* 287 F. 2d 382 (C.A. 2, 1961); see also *J. P. Greathouse Steel Erectors, Inc.* v. *Blount Brothers Construction Co.,* (D.C. D.C., C.A. No. 2635-64).

The *Greathouse* case, last-cited, involves another subcontract in the same form and under the same prime contract as are here involved, and that case has already been arbitrated pursuant to order of the court below. An appeal from the judgment on the award is now before this court in No. ~~19869.~~

II.

The Issue Here Is "Referable to Arbitration" Under the Arbitration Act

The second point mentioned by the court in the original order below (J.A. 7) was whether the issues were "referable to arbitration". The Act provides, 9 U.S.C. sec. 3, that a stay of the civil action should be granted by the court "upon being satisfied that the issue involved * * * is referable to arbitration" under the arbitration agreement. Here the agreement requires arbitration of "any question of fact". (J.A. 26). This is the language used in the standard "disputes" clause in construction contracts of the United States Government (ASPR 7-103.12 CCH Gov't Contracts Service ¶ 33,636.60.), and is designed to encompass the typical questions concerning contract performance which arise on every large construction project. *U. S.* v. *Callahan Walker Construction Co.* (1942), 317 U.S. 56, 87 L. Ed. 49; *Hiebert* v. *U. S.* (D. Alaska 1964), 235 F. Supp. 466, 467; *General Steel Products Corp.* v. *U. S.* (E.D. N.Y. 1941), 36 F. Supp. 498, 501. The dispute between Blount and Troitino involves these questions:

1. Did Troitino deliver stone on the dates required by the contract schedule? The question is one of fact: Troitino either did or did not deliver on the dates required.

2. Did Troitino erect stone no later than the dates required by the contract schedule? The question is one of fact: Troitino either did or did not erect each segment on or before the date required.

3. Did Troitino's failure to deliver and erect stone at the times specified effect any delay in the progress of the entire project? The question is one of fact: Troitino's failure either did or did not have an adverse effect on Blount's progress schedule.

4. In what amount of dollars was Blount damaged by Troitino's failure? The question is one of fact: Blount either was not damaged or was damaged in some factually ascertainable amount.

It was contended by plaintiff-appellee below that the agreement for arbitration should not be enforced because, among a variety of reasons, defendant's answer had not been filed.[2] However, an answer is not necessary prior to moving for a stay under the Arbitration Act, see e.g. *Greathouse Steel Erectors, Inc.* v. *Blount Brothers Construction Co.*, supra, D.C. D.C., C.A. No. 2635-64. Actually there was, and is, no bona fide question as to what the dispute involves; but in any event, as has been noted, there was attached to the motion as supplemented an affidavit (J.A. 11) of defendant's general counsel, Frank H. McFadden, who had conducted the negotiations for settlement of the dispute. This affidavit shows that the dispute was purely factual. *No counteraffidavit was filed* by plaintiff. Mr. McFadden's statements were, accordingly,

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2 The answer and counterclaim were not filed until after the court's denial of defendant's motion as supplemented. They were before the court when the defendant's motion for rehearing was acted upon.

in legal effect admitted. This court said in *Washington* v. *McGrath,* 86 U.S. App. D.C. 343, 182 F. 2d 375 (1950):

> "The affiants assert that the factual allegations in the complaint are without foundation. No contradictory affidavits were filed, and there would thus appear to be no genuine issue of fact upon the subject." (86 U.S. App. D.C. 344).

It may be further noted that on a motion to enforce an arbitration agreement the courts take the movant's version of the issues as true. In a case closely in point here generally, *Younker Brothers Inc.* v. *Standard Const. Co.,* 241 F. Supp. 17 (S.D. Ia. 1965), the court said:

> "The third point raised by Younkers is that the issues in this case are not arbitrable under the terms of the arbitration agreement.
>
> "This court must, however, take the movant's version of the facts and issues as true in deciding that question. Shanferoke Coal & Supply Corp., etc. v. Westchester Service Corp., 2 Cir., 70 F. 2d 297, affirmed 293 U.S. 449, 55 S. Ct. 313, 79 L. Ed. 583; Hiller v. Liquor Salesmen's Union Local No. 2, D. C., 226 F. Supp. 161; Petition of Pahlberg, D. C., 43 F. Supp. 761." (241 F. Supp. 17 at 18-19.)

In the *Shanferoke* case, cited by the court in the above excerpts from the *Younker* case, Judge Learned Hand said:

> "* * * Nor are we impressed with the notion that there was nothing to arbitrate. We may assume arguendo, though we do not mean so to decide, that if a party repudiates a contract in toto, he can neither insist on arbitration, nor compel the opposite party to do so. Jureidini v. National British Millers Ins. Co. (1915) A.C. 499; Aktieselskabet v. Rederiaktiebolaget Atlanten (D. C.) 232 F. 403. Here, though the defendant failed to perform, that was not a repudiation, and the arbitration clause was for the very purpose of adjusting breaches. We need not say that there can never be a breach so plain that the promisee may not have summary judgment, even in the face of an arbitration

clause (In re Wenger & Co. v. Propper Silk Hosiery Mills, 239 N.Y. 199, 146 N.E. 203); but the plaintiff's own right to repudiate was not so clear as that. *We must take the defendant's version on the issue;* * * *" (Emphasis added) (70 F. 2d 297, 299.)

At least in the federal courts arbitration agreements are liberally construed in order to accomplish the Congressional policy as manifested in the federal Arbitration Act. The Court of Appeals for the third circuit has recently said in this connection:

> "Finally, we find no error in the trial court's conclusion that the disputes are appropriate for arbitration under the contract. The arbitration clause therein requires the parties to submit 'any question with respect to performance, non-performance, default, compliance or non-compliance, whether on behalf of the Contractor or Subcontractor' to arbitration. The grievance asserted by petitioners is that respondents failed to meet time schedules, insisted upon performance of duties not required of petitioners under the contract, and failed to supply materials for petitioners. *In view of the federal policy to construe liberally arbitration clauses, to find that they cover disputes reasonably contemplated by this language, and to resolve doubts in favor of arbitration* (see Devonshire, supra, 271 F. 2d at page 410; Shanferoke Coal & Supply Corp. v. Westchester Service Corp., 1934, 293 U.S. 449, 453, 55 S. Ct. 313, 79 L. Ed. 583), it is clear that these disputes can reasonably be said to fall within the category of compliance or non-compliance." *Metro Industrial Painting Corp.* v. *Terminal Const. Co.*, 287 F. 2d 382 at 385. (Emphasis added)

CONCLUSION

The arbitration agreement contained in the subcontract between the parties should be enforced. The subcontract involved commerce in the District of Columbia, as well as interstate commerce, and hence was within the scope of the federal Arbitration Act. The dispute between the parties relates to the alleged delay of plaintiff-appellee in per-

formance; this issue involves "questions of fact" and hence is within the scope of the arbitration agreement. This case should proceed to arbitration as the parties intended.

Respectfully submitted,

FREDERICK A. BALLARD
912 American Security Building
Washington, D. C. 20005

FRANK H. MCFADDEN
1500 Brown-Marx Building
Birmingham, Alabama 35203

Attorneys for Appellant

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19889

BLOUNT BROTHERS CONSTRUCTION COMPANY, *Appellant*

v.

JOSEPH TROITINO, doing business as
TROITINO CONSTRUCTION COMPANY, *Appellee*

Appeal from Order of the United States District Court for the District of Columbia

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JOINT APPENDIX

Civil Docket

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 1253-'65

JOSEPH TROITINO, doing business as TROITINO CONSTRUCTION COMPANY, TRAVELERS INDEMNITY COMPANY, *Deft. on Counterclaim*

v.

BLOUNT BROTHERS CONSTRUCTION COMPANY, a corporation

1965

May 24 Complaint, appearance filed

May 24 Summons copies (1) and copies (1) of Complaint issued Ser 5/23/65

June 15 Motion of deft to enforce agreement and for stay; P&A; exhibit "A"; c/m 6/15/65; MC 6/15/65; appearance of Frederick A. Ballard. filed

June 22 Points and Authorities of pltff in opposition to motion to enforce agreement and for stay; c/m 6/22/65. Exhibits (2) filed

June 30 Motion to enforce agreement for arbitration and for stay of further proceedings pending arbitration argued and taken under advisement. (Rep. Kaufman) Youngdahl, J.

Jul 21 Order denying motion of deft to stay proceedings, without prejudice to deft to make new motion containing proper factual and legal foundation. (signed 7/20/65. (N) Youngdahl, J.

Jul 26 Interrogatories by pltf to deft; c/m 7/23/65. filed

Aug 3 Supplemental motion of deft to enforce agreement for arbitration and for stay of further proceedings pending arbitration; c/m 7/30/65; affidavits (3), Exhibits (2) M.C. 8/3/65. filed

Aug 9 Points and authorities of pltf in opposition to supplemental motion of deft to enforce agreement for arbitration and stay proceedings; c/m 8/6/65. filed

Aug 9 Answer of deft to interrogatories; c/m 8/9/65. filed

Aug 18 Interrogatories of pltf to deft; c/m 8/18/65. filed

Sep 7 Answer of deft to interrogatories; c/m 9/6/65. filed

Sep 10 Request by deft for admissions; c/m 9/7/65. filed

Sep 15 Objections by pltf to request of deft for admissions; c/m 9/15/65; MC 9/15/65. filed

Oct 28 Supplemental motion to enforce agreement for arbitration and objections to deft's request for admissions argued and taken under advisement. (Ida V. Watson, Reporter) McGarraghy, J.

Nov 5 Order sustaining pltf's objections to deft's request for admissions. (N) McGarraghy, J.

Nov 5 Order denying supplemental motion of deft to enforce agreement for arbitration and for stay of further proceedings pending arbitration. (N) McGarraghy, J.

Nov 15 Answer of deft to complaint; counterclaim vs pltf; c/m 11/15/65; exhibits A & B; appearance of Frederick A. Ballard. filed

Nov 15 Motion of deft to bring in additional party pursuant to counterclaim; P&A; c/m 11/15/65. filed

Nov 15 Motion of deft for rehearing of motion to enforce arbitration agreement and for stay; P&A; c/m 11/15/65; MC 11/15/65. filed

Nov 16 Order granting motion to bring in the Travelers Indemnity Company as party deft to counterclaim. (N) McGarraghy, J.

Nov 18 Points and authorities of pltf in opposition to deft's motion for rehearing; c/m 11/18/65. filed

Nov 22 Summons, copy and copy of order, motion, answer & counterclaim issued to Travelers Indemnity Company. Ser 11/24/65

Nov 23 Order denying motion of deft for rehearing of motion to enforce arbitration agreement and for stay of further proceedings. (N) McGarraghy, J.

Nov 29 Answer of pltf to counterclaim; c/m 11/26/65. filed

Dec 3 Notice of appeal by deft from order of 11/5/65. Copy mailed to Karl K. Spriggs and John F. Myers. Deposit $5.00 by Ballard. filed

Dec 13 Cost Bond on Appeal in sum of $250.00 with The Fidelity & Casualty Co. of New York, approved. (fiat) McGarraghy, J.

Dec 23 Answer of Travelers Indemnity Co. to counterclaim of Blount Bros; cross-claim vs Troitino; c/m. filed

1966

Jan 11 Record on appeal delivered to USCA. Deposit by Ballard $1.25.

Jan 11 Receipt from USCA for original papers. filed

Jan 25 Interrogatories by Travelers Indemnity Company to Blount Brothers Construction Co.; c/m 1/25/66. filed

[Filed May 24, 1965]

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1253-'65

JOSEPH TROITINO, doing business as TROITINO CONSTRUCTION COMPANY, Crayton Road, Asheville, North Carolina, *Plaintiff*

v.

BLOUNT BROTHERS CONSTRUCTION COMPANY, a corporation, 79 Commerce Street, Montgomery, Alabama

SERVE: D.C. Agent, C T Corporation System, 918 Sixteenth Street, N.W., Washington, D.C., *Defendant.*

Complaint for Balance Due on Contract

1. This Court has jurisdiction under Title 28, United States Code, Section 1332, as amended, and Title 11, District of Columbia Code, 1961 Edition, Sections 305 and 306. The amount in controversy exceeds the sum of $10,000.00, exclusive of interest and costs.

2. Plaintiff, Joseph Troitino, an individual doing business as Troitino Construction Company, is a citizen of the State of North Carolina.

3. Defendant, Blount Brothers Construction Company, is a corporation organized and existing under the laws of the State of Delaware, having its principal place of business at 79 Commerce Street, Montgomery, Alabama. Defendant is engaged in business in the District of Columbia.

4. Defendant, as prime contractor, entered into a contract with the District of Columbia, a municipal corporation, dated on or about November 3, 1960, contract No. D.C.F.C. 18895, for the construction of Southwest Freeway,

Interloop—Center Leg Connection—Railroad and Roadway Structure, located in the District of Columbia.

5. Plaintiff and defendant entered into a subcontract, dated December 8, 1961, for the performance of certain masonry work required under the terms of the above-mentioned prime contract. Plaintiff also performed certain extra and additional work for the defendant in connection with the prime and subcontract work.

6. All work required by the contract and subcontract, including the said extra and additional work, has been completed, accepted and paid for by the District to defendant. Plaintiff has performed all conditions precedent to his recovery herein.

7. Defendant has failed and refused to pay plaintiff the sum of $82,397.26, representing the unpaid balance due him from defendant for the performance of the aforesaid subcontract and for extra and additional work performed by him.

WHEREFORE, the premises considered, plaintiff, Joseph Troitino, doing business as Troitino Construction Company, demands judgment against defendant, Blount Brothers Construction Company, in the amount of $82,397.26, plus interest thereon at the rate of six per cent per annum from May 1, 1965.

KAHL K. SPRIGGS
JOHN F. MYERS
504 Southern Building
Washington, D. C. 20005
Attorneys for Plaintiff

[Filed June 15, 1965]

Motion to Enforce Agreement for Arbitration and for Stay of Further Proceedings Pending Arbitration

Defendant moves, pursuant to the United States Code, Title 9, sections 3, 4 and 6, for an order directing plaintiff to proceed forthwith to arbitrate the disputes which have arisen under the contract between plaintiff and defendant, as required by Article XIII of the contract; and staying further proceedings herein pending issuance of the arbitration award.

s/ Frederick A. Ballard
Frederick A. Ballard
912 American Security Building
Washington, D. C. 20005
Attorney for Defendant

[Filed July 21, 1965]

Order

Upon consideration of the defendant's motion pursuant to 9 U.S.C. § 3, to stay the proceedings in the above captioned action pending arbitration; and upon consideration of the plaintiff's opposition thereto, which differs substantially from the opposition in the *Greathouse* case, relied upon by the defendant, and upon further consideration of argument in open court and the file of the case; it appearing to the Court that the defendant has not made a sufficient showing that the above civil action contains an "issue referable to arbitration" and that fact not appearing elsewhere in the file of the case; and it further appearing that the defendant has not made a showing that the contract sued upon embraces a transaction involving commerce within Section 2 of the Federal Arbitration Act, that issue having been raised in opposition to this motion, it is, therefore, by the Court this 20th day of July, 1965,

ORDERED That said motion to stay proceedings be and the same hereby is denied, but without prejudice to the defendant to make a new motion containing a proper and complete factual and legal foundation.

LUTHER W. YOUNGDAHL
Judge

[Filed August 3, 1965]

Supplemental Motion to Enforce Agreement for Arbitration and for Stay of Further Proceedings Pending Arbitration

On June 15, 1965, defendant filed its original motion herein for enforcement of the arbitration agreement contained in the contract between plaintiff and defendant, and for a stay of the instant action pending arbitration. By order of July 20, 1965 (filed July 21) the Court denied the motion

> "without prejudice to the defendant to make a new motion containing a proper and complete factual and legal foundation."

The present motion is filed in accordance with the Court's statement.

The Court's order states further that

> "defendant has not made a sufficient showing that the above civil action contains an 'issue referable to arbitration' "

and that

> "the defendant has not made a sufficient showing that the contract sued upon embraces a transaction involving commerce within section 2 of the Federal Arbitration Act."

With respect to the first point, the contract between the parties provides that

"If any question of fact shall arise under this contract * * * then either party hereto may demand an arbitration * * * (Article XIII).

Attached hereto is an affidavit of the defendant's general counsel showing the purely factual nature of the controversy between these parties, together with a copy of the subcontract between them.

With respect to the second point raised by the Court's order, the contract between plaintiff and defendant is a subcontract under defendant's general contract with the District of Columbia for construction of portions of the extensive railroad and interstate highway project known as the Southwest Freeway development in southwest Washington. Attached hereto, in addition to the relevant portion of the general contract, are affidavits showing the direct and immediate relation to interstate commerce of both the general contract and the subcontract, if such a relation is deemed to be required by the Federal Arbitration Act with respect to construction which is, as here, "*in* the District of Columbia." (9 U.S.C. sec. 1).

/s/ Frederick A. Ballard
Frederick A. Ballard
912 American Security Building
Washington, D. C. 20005
Attorney for Defendant

Of Counsel:

/s/ Frank H. McFadden
Frank H. McFadden F.A.B.
1500 Brown-Marx Building
Birmingham, Alabama 35203

Attachments:
Affidavit of John A. Caddell
Affidavit of Frank H. McFadden
Affidavit of Thad H. Pruett
Copy of subcontract between plaintiff and defendant
Excerpt from general contract relating to scope of the work

Affidavit of John A. Caddell

STATE OF ALABAMA }
MONTGOMERY COUNTY }

Before me, the undersigned authority, personally appeared John A. Caddell, who being first duly sworn, deposes and says:

That he is a Vice President of Blount Brothers Corporation, the successor by merger to Blount Brothers Construction Company, and as such is familiar with the project known as the Southwest Freeway Inner Loop, Center Leg Connection, Railroad Structures and Roadways, Federal Aid Interstate Project No. I-IG-95-1(6)2, D.C. Contract No. 18895 between Blount Brothers Construction Company and the Government of the District of Columbia; and that he is familiar with the subcontract between Blount Brothers Construction Company and Joseph Troitino, d.b.a., Troitino Construction Company for certain work on the said project.

That the principal work required by the contract was as follows:

1. Removal and replacement of two railroad bridges, one such structure carrying the main freight lines of the Pennsylvania Railroad north and south through Washington, D.C.; the other structure carrying passenger trains en route to Union Station, Washington, D.C. Both existing railroad bridges were removed and replaced while under train traffic; i.e., the bridges were removed and replaced in halves while maintaining the required traffic load.

2. Construction of a vehicular bridge and connecting ramps all in conjunction with the termination of Interstate Highway No. 95 in Washington, D.C. Interstate Highway No. 95 when completed will serve the East Coast from Miami to New York.

That Troitino Construction Company was contracted by Blount Brothers Construction Company to furnish and

place stone masonry required for construction of the railroad bridges, the vehicular bridge and ramps.

That under the terms of the contract the work was subject to the inspection of the Federal Government, Bureau of Public Roads, and the Chief Engineer of the Pennsylvania Railroad.

JOHN A. CADDELL
John A. Caddell

Sworn to and subscribed before me this 26th day of June 1965.

BILLY J. HENDON
Notary Public

(My commission expires 2/19/68)

[Filed July 30, 1965]

Affidavit of Frank H. McFadden

Frank H. McFadden being duly sworn deposes and says:

1. I am an attorney and a member of the firm of Bradley, Arant, Rose & White, 1500 Brown-Marx Building, Birmingham, Alabama.

2. This firm is general counsel for Blount Brothers Corporation, the successor by merger to Blount Brother Construction Company and I am the attorney charged with the responsibility for dealing with Blount Brothers matters.

3. I have been consulted by Blount Brothers with respect to Troitino matters since early in 1962 and I have been present at conferences attended by representatives of Blount, Troitino and Troitino's subcontractors and suppliers. I have held separate conferences with Troitino's attorneys.

4. The issues between Blount Brothers and Troitino are, as I understand them, as follows:

a. Did Troitino deliver and erect stone in accordance with the schedule required by his contract with Blount?

b. Did the failure to deliver and erect stone delay the progress of the construction of the project?

c. What damages were occasioned by the failure of Troitino to deliver and erect stone in accordance with its subcontract with Blount?

FRANK H. McFADDEN
Frank H. McFadden

Sworn to and subscribed before me this 28th day of July, 1965.

PEGGY W. RAMSEY
Notary Public

(My commission expires 9-13-68.)

Affidavit of Thad H. Pruett, Contract Manager, Heavy Division Blount Brothers Corporation

STATE OF ALABAMA
COUNTY OF } ss:

Thad H. Pruett, being first duly sworn, deposes and says:

That he was the Contract Manager for the Heavy Division, Blount Brothers Construction Company, a Division of Blount Brothers Corporation, of Montgomery, Alabama, defendant in the above entitled action; that he is familiar with the general contract between Blount and the District of Columbia; that the performance of the general contract required Blount supervisory personnel to be transported from various parts of the country as follows:

Project Superintendent—from Krotz Springs, Louisiana

Steel Erection Superintendent—from Wabbaseka, Arkansas

Office Manager—from Hampton, Virginia

General Foreman—from Birmingham, Alabama

Carpenter Superintendent—from Jasper, Alabama

That according to the records of the Company, it was necessary in the performance of the general contract for a substantial portion of the construction materials and supplies to be transported from other parts of the country to Washington, D. C. including the following as examples:

Structural Steel—from Birmingham, Alabama, Nashville, Tennessee, and Montgomery, Alabama

Reinforcing Steel—from Gastonia, North Carolina

Steel Bearing Piling—from Bethlehem, Pennslyvania

Monotube Piling—from Canton, Ohio

Steel Sheet Piling—from New York City

Hand Railing—from Wheeling, West Virginia and Indianapolis, Indiana

That he is in particular familiar with the stonework subcontract under the aforesaid general contract, between Blount and Troitino Construction Company, plaintiff in the above-entitled action (true copy of which subcontract is attached hereto); that for a substantial portion of the stone furnished under said subcontract Troitino contracted with Vickery Stone Company of Upper Darby, Pennsylvania, stone brokers; that Vickery in turn contracted for the stone with Davidson Granite Company, Inc., of

Lithonia, Georgia; and that the stone was produced in and shipped to the job from Georgia.

THAD H. PRUETT
Thad H. Pruett

Subscribed and sworn to before me this 29th day of July, 1965.

NANCY N. MACHEN
Notary Public

(SEAL) My commission expires: December 12, 1965.

EXHIBIT A

BLOUNT BROTHERS CONSTRUCTION COMPANY
HEAVY CONSTRUCTION DIVISION
Montgomery, Alabama

SUBCONTRACT

—WITH—

Troitino Construction Company Amount $313,336.40
(Approximate)

This agreement entered into this 20th day of April, 1961, by and between Blount Brothers Construction Company, of Montgomery, Alabama, hereinafter called Contractor, and Troitino Construction Company of Asheville, North Carolina, hereinafter called Subcontractor.

WITNESSETH that, WHEREAS, Contractor has heretofore entered into a General Contract with the District of Columbia Department of Highways of Washington, D. C., hereinafter called the Owner, to furnish all labor and materials and perform all work required for Federal Aid Interstate Project No. I-IG-95-1(6)2, Southwest Freeway, Inner Loop —Center Leg Connection, Railroad Structures and Roadways in strict accordance with the specifications, schedules

and drawings prepared by the District of Columbia Department of Highways, which are made a part of said General Contract, and which are now made a part of this subcontract insofar as they apply, and the parties hereto desire to contract with reference to a part of said work.

Now Therefore, in consideration of the mutual agreements herein contained, it is agreed as follows:

Article 1—Subcontractor shall furnish all labor, materials, fuel, equipment, tools, machinery and supplies and perform all work and do all things necessary to complete the following part or parts of the work of the General Contract in all respects as is therein required of Contractor, and all work incidental thereto and at prices stated, namely:

PAGE NO. 1A ATTACHED HERETO AND MADE A PART HEREOF OF THIS SUBCONTRACT NO. 535-11 BETWEEN BLOUNT BROTHERS CONSTRUCTION COMPANY AND TROITINO CONSTRUCTION COMPANY

WORK AND PRICES

Bid Item	Description	Estimated Quantity	Unit Price	Amount
19	Slope Paving	2,864 S.Y.	$ 7.00	$ 20,048.00
31	Class A (Dimensioned) Masonry	15,372 C.F.	15.00	230,580.00
32	Class C Masonry	10,858 C.F.	4.50	48,861.00
33	Class B Stone Masonry Facing	2,198 C.F.	6.30	13,847.40
	Total Estimated Amount			$313,336.40

The above unit price of $4.50 per cubic foot for Bid Item 32 includes one (1) mason furnished by the Subcontractor for work in connection with removal of existing stone masonry, which is included under Bid Item 4, Removal Railroad Walls and Fill, of the General Contract. Cleaning and hauling salvaged stone from the stockpile and setting same is also included.

Anchors are included under Bid Item 31 above.

Furnishing and placing subbase material for slope paving is included under Bid Item 19 above.

The above items of work are to be performed complete, in accordance with the Contract Plans and District of Columbia Department of Highways General Provisions and Standard Specifications for Structures dated 1957 and Special Provisions for Federal Aid Interstate Project No. I-IG-95-1(6)2, with:

Addendum No. 1 dated September 1, 1960
Addendum No. 2 dated October 13, 1960
Addendum No. 3 dated October 21, 1960
Addendum No. 4 dated October 24, 1960
Addendum No. 5 dated October 25, 1960

All for the above-mentioned project.

In the event the Subcontractor subcontracts any of the above work, the Subcontractor shall furnish evidence satisfactory to the Railroad, that with respect to the operations performed for him by subcontractors, he carries in his own behalf regular Subcontractor's Protective Public Liability Insurance providing for a limit of not less than $200,000.00 for all damages arising out of bodily injuries to or death of one person, and, subject to that limit for each person, a total of $1,000,000.00 for all damages arising out of bodily injuries to or death of two or more persons in any one accident, and regular Subcontractor's Protective Property Damage Liability Insurance providing for a limit of not less than $200,000.00 for all damages arising out of injury to or destruction of property in any one accident and subject to that limit per accident, a total (or aggregate) limit of $500,000.00 for all damages arising out of injury to or destruction of property during the life of the Contract.

This subcontract is contingent upon the approval of the Subcontractor by the District of Columbia Department of Highways.

Special reference is made to Articles 17 and 18 of the General Contract, which are a part of this Subcontract.

The Subcontractor shall submit payrolls as required by the District of Columbia Department of Highways and/or Contractor.

The above quantities are approximate only, being stated solely for the purpose of negotiating a contract price, and subject to change and variation upward or downward, it being intended that the Subcontractor shall fully perform and complete the aforementioned part or parts of the General Contract, as presently written or hereafter modified, in all respects as required of the Contractor therein.

It is mutually agreed and understood that the Contractor is not an insurer or guarantor of the said work or of any part thereof, or quantities thereof, or of the performance by the Owner of the original contract as specified therein or otherwise, and that the Subcontractor shall be bound by any changes or alterations made by the Owner in the said original contract, plans or specifications, or in the amount or character of said work or any part thereof, to the same extent that the Contractor is bound thereby.

Article II—(a) Contractor shall have the same rights and privileges as against the Subcontractor herein as the Owner in the General Contract has against Contractor.

(b) Subcontractor acknowledges that it has read the general contract and is familiar with each and every part of said general contract affecting his operation together with all related plans, specifications, general and special provisions and conditions incidental thereto and by examination has satisfied himself as to the nature and location of the work, the character, quantity and kinds of materials to be encountered and the character, kind and quantity of the equipment needed during the prosecution of the work and location, conditions and other matters which can in any manner affect the work under this agreement. Fur-

ther said subcontractor is familiar with respective rights, powers, benefits and liabilities of the Contractor and the Owner thereunder and agrees to comply with and perform all provisions thereof applicable to Subcontractor.

(c) All work shall be done under the direction of the Owner or Owner's representative and its decisions as to the true construction and meaning of the drawings and specifications shall be final, subject to sub-paragraph (e) below. Subcontractor shall conform to and abide by any additional specifications, drawings or explanations by the Owner to illustrate the work to be done.

(d) Subcontractor shall procure at its own expense all required permits and licenses.

(e) Contractor shall have the right, but not the obligation, to inspect all working drawings, to inspect all work required of the Subcontractor hereunder, and all such working drawings and work shall be subject to approval of the Contractor. Contractor shall have the right, but not the obligation, to inspect equipment of Subcontractor, and the adequacy of such equipment shall be subject to approval of Contractor. It is expressly understood that the approval of the Subcontractor's working drawings and inspection of the Subcontractor's work and equipment is general only, and such approval or inspection will not relieve the Subcontractor from any responsibility whatsoever.

Article III—(a) Subcontractor shall begin work as soon as instructed by Contractor and shall carry on said work promptly, efficiently and at a speed that will not cause delay in the progress of Contractor's work or other branches of the work carried on by other subcontractors. Contractor may, from time to time, reschedule the order of the work to be performed and may require Subcontractor to prosecute in preference to other parts of the work such part or parts as Contractor may specify.

(b) Subcontractor, at Contractor's request and at the time specified in such request, shall submit to Contractor

progress, procurement and man-hour completion schedules, satisfactory in form and content to Contractor, and upon Contractor's acceptance of the schedules, shall prosecute the work in accordance therewith, subject to the provisions of Article III(a) above.

(c) Any damages for delay caused by Subcontractor, including actual damages which Contractor sustains or for which Contractor is liable to others, and including any damages, liquidated or otherwise, for which Contractor is liable to Owner, or as results of Subcontractor's failure to comply with progress schedules required by Article III(b) above, shall be deducted by Contractor from the agreed price for said work as liquidated damages and not as a penalty; subject, however, to the option of Contractor to terminate said employment for default as herein elsewhere provided.

(d) Contractor shall not be liable to Subcontractor for delay to Subcontractor's work by the act, neglect or default of the Owner or Owner's representative, or by reason of fire or other casualty, or on account of riots or strikes, or other combined action of the workmen or others, or on account of any acts of God or any other cause beyond Contractor's control, or any circumstances caused or contributed to by any subcontractor or any other party performing a part of the work; but Contractor will cooperate with Subcontractor to enforce any just claim against the Owner or Owner's representative for delay, provided Contractor incurs no extra expense in connection therewith.

(e) Should Subcontractor be delayed in his work by Contractor, then Contractor shall owe Subcontractor therefor only an extension of time for completion equal to the delay caused and then only if a written claim for delay is made to Contractor within forty-eight (48) hours from the time of the beginning of the delay.

Article IV—(a) Subcontractor shall make all alterations, furnish the material for and perform all extra work or

omit any work the Owner or Owner's representative may require. No alterations or changes shall be made, however, except upon written order from contractor, and contractor shall not be held liable to subcontractor for any extra labor, material or equipment furnished without such written order. The amount to be paid by the Contractor for work for which unit prices are stated in Article I hereof shall be based on the quantities actually furnished or performed and approved by Owner, at the unit prices shown in Article I hereof, it being understood that said quantities actually furnished or performed may vary from the quantities shown in Article I hereof. The amount to be paid by the Contractor as a result of changes in the work for which a lump sum is provided in Article I hereof shall be stated in the change order if the amount can be agreed upon; but if not, then Subcontractor shall follow the appeal procedure set up in the General Contract between the Owner and Contractor (such appeal to be at Subcontractor's expense); and provided, further, that where the General Contract contains no appeal provisions, then it shall be fixed by arbitration as provided in Article XIII hereinbelow; but, meanwhile, the work shall proceed as directed.

(b) Subcontractor shall submit proposals for alterations or changes in the manner provided in the General Contract, unless instructed otherwise by Contractor.

(c) Subcontractor shall submit all claims for extra costs in the manner provided in the General Contract, through the Contractor for transmittal to the Owner. As to any extra work, in no event shall Contractor be liable to Subcontractor for an amount greater than the amount received by Contractor from Owner for such part of the extra work performed by Subcontractor.

Article V—(a) Subcontractor shall provide safe and sufficient facilities at all times for inspection of the work by Contractor, Owner, or their duly authorized representatives,

and shall, within twenty-four (24) hours after receiving written notice from Contractor, proceed promptly to take down or remove all portions of the work and remove from the grounds and buildings all material, whether worked or unworked, which the Owner or Owner's representative shall condemn or fail to approve, and shall promptly make good all such work and all other work damaged or destroyed in removing or making good said condemned work.

(b) Subcontractor shall remove from the premises, as often as directed by the Contractor, all rubbish and surplus material which may accumulate from the prosecution of said work, and should Subcontractor fail to do so, Contractor may, at its option, remove same at Subcontractor's expense.

Article VI—(a) Subcontractor shall at all times supply adequate machinery, tools, appliances and equipment, a sufficient number of properly qualified workmen and a sufficient amount of materials and supplies of proper quality to prosecute said work efficiently and promptly, and to maintain progress in accordance with progress schedules provided for in Article III(b) above. If, in the opinion of Contractor, Subcontractor falls behind said schedules, Subcontractor shall take such steps as may be necessary to improve its progress, and Contractor may require Subcontractor, after having given one week's notice in writing, to increase the number of shifts, to institute or increase overtime operations, to increase its forces and equipment, and to take such other steps as may reasonably be required in order to make the Subcontractor's progress conform to such schedules, all without additional cost to Contractor. If Subcontractor fails to comply with any such requirements, such failure shall be deemed a breach of this agreement and Contractor may, in addition to any other remedies he may have under this agreement, withhold all payments due Subcontractor until Subcontractor's progress conforms to such schedules.

(b) Subcontractor shall promptly pay for all materials purchases, machinery and rental equipment and shall pay all workmen each week, and, at Contractor's request, shall obtain and furnish Contractor weekly with signed receipts from all workmen, showing the date of payment, amount paid, number of hours paid for, the days on which said work was performed, the classification of the labor so paid and the rate of wage per hour paid, and, at Contractor's request, shall supply Contractor weekly with a reasonable number of copies of payroll, verified by Subcontractor.

(c) The Subcontractor shall adequately supervise the work and shall have a competent foreman or superintendent satisfactory to Contractor on the work at all times during progress, with authority to act for Subcontractor.

Article VII—To secure performance by Subcontractor and any funds expended by Contractor hereunder, Contractor shall have a lien upon all machinery, materials, tools, appliances and equipment of Subcontractor on the premises or used in connection with said work, and none of said machinery, materials, tools, appliances and equipment shall be removed from the job-site at any time prior to completion and acceptance of said work covered by this Subcontract, unless a written release of said equipment is secured from the Contractor.

Article VIII—(a) Subcontractor shall turn said work over to Contractor in good condition and free and clear of all claims, encumbrances and liens and shall protect and save harmless Contractor and Owner from all claims, encumbrances and liens growing out of the performance of this Subcontract. Any fees or expenses incurred by the Contractor on account of default by the Subcontractor or on account of claims against the Contractor or Subcontractor by third parties arising out of matters covered in this Subcontract shall be chargeable to the Subcontractor who agrees to pay such reasonable fees and expenses, including reasonable attorneys fees. Any statement herein

to the contrary notwithstanding, Contractor shall have the right, but not the obligation, to defend any such claims against the Subcontractor, at Subcontractor's expense.

(b) Subcontractor shall, as often as required by the Owner or Contractor, furnish a sworn statement showing all parties who furnish labor or materials to Subcontractor, with their names and addresses and the amount due or to become due each. Like statement may be required from any subcontractors of Subcontractor.

(c) Subcontractor agrees to, and does hereby, guarantee its work against all faulty workmanship or defective materials as required in the General Contract, expressed or implied.

Article IX—(a) Subcontractor agrees to indemnify, hold and save harmless Contractor against all loss, costs or expenses on account of injury (including death) to persons (including agents, servants and employees of Subcontractor) or on account of damage to property occurring in, arising out of, or sustained in connection with the performance of said work, even though said injury or damage is caused, occasioned or contributed to by the negligence, sole or concurrent, or other conduct of Contractor. Subcontractor shall defend all suits brought against Contractor (in which connection Subcontractor shall employ lawyers acceptable to Contractor) on account of any such injuries or damage and shall reimburse Contractor for any expenses, including reasonable attorneys fees, sustained by Contractor by reason of such injury or damage.

(b) The Subcontractor shall provide at its expense the kinds and amounts of insurance itemized below:

(A) Workmen's Compensation Insurance, Statutory, State of District of Columbia.

(B) Public Liability Insurance in amount of $200,000.00, each person, $1,000,000.00 each accident.

(C) Property Damage; $200,000.00, each accident; $500,000.00 aggregate.

(D) Bodily injury Automobile; $50,000.00, each person; $100,000.00 each accident.

(E) Property Damage Automobile; $10,000.00, each accident. See Page 1A for additional insurance requirements.

The insurance policies required herein shall contain an endorsement to the effect that the Contractor will be given ten days prior written notice by registered mail before cancellation, expiration or any material change in the insurance policies.

(c) Subcontractor, as a part of the obligations assumed by him in this subcontract, accepts exclusive liability for all taxes and contributions required of the Contractor or Subcontractor by the Federal Social Security Act and the Unemployment Compensation Law or similar law in any state with respect to the employees of Subcontractor in the performance of the work herein provided for, and agrees to furnish Contractor with suitable written evidence that it has been authorized to accept such liability. Subcontractor further agrees that if it cannot furnish said evidence, or should fail to do so, prior to beginning his work, Contractor may, at its option, pay or reserve for payment said taxes and contributions and deduct the amount paid or reserved from payments due or to become due Subcontractor. Subcontractor agrees to protect Contractor against all liability in respect to said employees under said Act or Laws.

(d) Subcontractor accepts exclusive liability for any and all sales tax which may be assessed against materials, equipment or labor used in its part of the work or which may arise out of this subcontract.

(e) Sub-contractor shall, at the time and in the manner provided, abide by and conduct the work hereunder in full

compliance with any and all applicable federal, state, local and municipal laws, ordinances and orders, and any and all rules and regulations of governmental boards and bureaus, and shall save harmless the Contractor from any and all liability with respect thereto.

Article X—

(here, either set out or attach)

Subcontractor is to use labor that will work harmoniously with labor which is employed by the Contractor.

Article XI—Subcontractor agrees to indemnify and save harmless Contractor from any and all claims or suits for infringement of patents, or violation of patent rights, by Subcontractor, and further agrees to pay all loss and expense incurred by Contractor by reason of any such claims or suits, including counsel fees.

Article XII—Contractor agrees to pay Subcontractor for said work in accordance with prices stated in Article I above (any exchange shall be borne by Subcontractor) subject to additions and deductions as hereinbefore provided, payable as the work progresses, based on estimates submitted by Subcontractor and approved by Contractor, and subject to receipt by Contractor of payment from the Owner. Contractor may, at its option, retain 10% of each estimate until final payment and may withhold payment of any estimate until Subcontractor has furnished Contractor with suitable evidence that it has paid in full for all labor, materials and supplies used in the work through the date of the estimate. Final payment shall be made within 30 days after the completion of the work included in this subcontract, written acceptance by the Owner or Owner's representative and full payment therefor by the Owner; except that Contractor may deduct from such final payment any sums due to Contractor from Subcontractor under this subcontract or otherwise.

Article XIII—If any question of fact shall arise under this contract and there is no provision for settlement in the General Contract, then either party hereto may demand an arbitration by reference to a board of arbitration, to consist of one person selected by Contractor, and one person selected by Subcontractor, and these two to select a third; and in case these two shall fail to select a third within three days, either party hereto shall have the right to request that the third arbitrator be named by the American Arbitration Association. In case either party fails to name an arbitrator within three days after requested to do so, then the other party shall have the right to request the American Arbitration Association to name an arbitrator to represent the party so failing to name one. The written decision of any two of this Board shall be final and binding on both parties hereto. Each party shall pay one-half of the expense of such reference.

Article XIV—Subcontractor shall give separate performance and payment bonds payable to Contractor, each in the sum of $313,336.40, on the forms attached, with surety thereon satisfactory to Contractor, for the faithful performance of this Subcontract, including changes or modifications thereto without consent of surety, and for the payment of all labor, services, equipment, tools, machinery, equipment and machinery rental, materials and supplies, and all other items of expense incurred by Subcontractor in the prosecution of said work. Bonds are to be provided at the Contractor's expense.

Article XV—(a) Should Subcontractor at any time breach this agreement or fail to prosecute the said work with promptness, diligence and efficiency or fail to perform any of the requirements hereof, Contractor may without notice (or if notice be required by law, then after twenty-four (24) hours' written notice either by registered mail addressed to Subcontractor at Post Office Box 2929, Ashe-

ville, North Carolina, or by posting in some conspicuous place on the job) proceed as follows:

1. Provide such materials, supplies, equipment, machinery, tools, labor and supervision as may be necessary to complete said work, pay for same and deduct the amount so paid from any money then or thereafter due Subcontractor, or

2. Withhold payment of any estimate in the event Subcontractor be in default under this subcontract or any provision hereof, other provisions of this subcontract notwithstanding.

3. Terminate the employment of Subcontractor, enter upon the premises and take possession, for use in completing the work, of all the materials, supplies, tools, equipment, machinery and appliances of Subcontractor thereon and complete the work, or have same completed by others, and be liable to Subcontractor for no further payment under the agreement until final payment is due, and then only if and to the extent that the unpaid balance of the amount to be paid under this subcontract exceeds the expense of Contractor in finishing the work.

(b) If the amount expended by Contractor under "1" above, or the cost of completing the work under "3" above, exceeds the unpaid balance of subcontract price herein stated, Subcontractor shall pay Contractor such excess upon demand.

(c) Should Subcontractor at any time fail to pay for all labor, services, materials and supplies, machinery, appliances, tools and all other things used by Subcontractor in said work when due, Contractor, at its option, may pay for same and charge to Subcontractor; or may, at its discretion, and with the consent of Subcontractor, pay at any time claims for labor, materials and supplies and all other things used in the work.

(d) Should Subcontractor default in any of the provisions of this subcontract and should Contractor employ an attorney to enforce any provision hereof, or to collect damages for breach of the subcontract, or to recover on the bonds mentioned in Article XIV above, Subcontractor and its surety agree to pay Contractor such reasonable attorneys fee as Contractor may expend therein.

(e) The rights and remedies granted to Contractor under this article and those granted to the Contractor pursuant to the other provisions of this subcontract shall be cumulative and are not intended to be in lieu of any legal right or remedy which Contractor may have against Subcontractor for breach of this subcontract or default hereunder afforded by state or federal law.

Article XVI—(a) Subcontractor shall not sublet, assign or transfer this subcontract, or any part thereof, without the written consent of Contractor. However, in event of a subletting, assignment or transfer of this subcontract, as between the Contractor and Subcontractor herein, the Subcontractor shall remain fully bound to the Contractor under all terms of this agreement.

(b) In all events Subcontractor, in addition to all Subcontractor's other obligations hereunder, shall be liable for and shall indemnify and hold harmless the Contractor from any and all claims of every kind and character which may be made by or for the account of any subcontractor of the Subcontractor herein and from all claims of every character and description which may be made against any subcontractor of the Subcontractor named herein.

(c) In all events the term "Subcontractor", wherever used throughout this entire agreement, shall also include and be applicable to subcontractor of said Subcontractor.

Article XVII—This subcontract contains the entire agreement between the parties, and all additions thereto

or changes therein shall be in writing and shall not be binding unless same are in writing.

Article XVIII—The Subcontractor agrees that, if in the event of renegotiation or contract termination, or information relating to renegotiation or contract termination is required by the Owner, it will, upon demand of an authorized representative of the Contractor and/or Owner, furnish all information necessary for such renegotiation or contract termination proceedings.

Article XIX—As against the obligations herein contained, Subcontractor and its surety waive all rights of exemption.

Article XX—

In Witness Whereof, the parties hereto have hereunto set their hands and seals the day and year first above written.

Witnesses: (One for each party)

C. S. Neilson
Asheville, N. C.
(Address)

Ethelien C. Kirkpatrick
Montgomery, Arkansas
(Address)

Troitino Construction Company (Seal)
(Subcontractor)

By Joe Troitino
Title Sole Owner

Blount Brothers Construction Company
(Contractor)

By Alfred K. Allen
Alfred K. Allen
Title Vice President
Heavy Construction Division

[Excerpt from general contract relating to scope of the work]

2. Description and Scope of Work

The work consists of the construction of two railroad bridges to replace those now being used, and one bridge to carry vehicular traffic over a connecting roadway, together with the relocation of a water main; construction of duct banks for railroad communication, power and signal cables; replace two catenary support structures and modify one signal catenary support structure on one bridge; remove abandoned cables from abandoned conduit lines; street lighting; and clearing, grading and drainage. Substructures for bridges are to be founded on piles on which reinforced concrete footings, piers, columns and abutments faced with stone masonry are to be constructed to carry deck type superstructures of structural steel.

Filed November 5, 1965

Order Denying Supplemental Motion to Enforce Agreement for Arbitration, Etc.

Upon consideration of the supplemental motion by defendant to enforce agreement for arbitration and for stay of further proceedings pending arbitration, oral argument having been had thereon, it is by the Court this 5th day of November, 1965,

ORDERED, that such motion be and the same hereby is, denied.

(s) JOSEPH C. MCGARRAGHY
Judge

Filed November 15, 1965

Motion for Rehearing of Defendant's Motion to Enforce Arbitration Agreement and for Stay

Defendant, Blount Brothers Construction Company, moves for rehearing of the Court's order of November 5, 1965, denying defendant's Motion to Enforce Arbitration Agreement and for Stay. The grounds for the motion are that a refusal to enforce an arbitration agreement involving interstate commerce is unprecedented in this jurisdiction, would clearly violate the Federal Arbitration Act (Title 9 U.S.C.), and can only have resulted from failure of counsel properly to clarify the question on the motion.

/s/ Frederick A. Ballard
Frederick A. Ballard
912 American Security Building
Washington, D. C. 20005

/s/ Frank H. McFadden
Frank H. McFadden
1500 Brown-Marx Building
Birmingham, Alabama 35203
Attorneys for Defendant

Filed November 15, 1965

Answer and Counterclaim of Defendant

First Defense

Defendant, Blount Brothers Construction Company, answers the allegations of the Complaint for Balance Due on Contract as follows:

1. Defendant admits the allegations of paragraph 1 of the Complaint.

2. Defendant admits on information and belief the allegations of paragraph 2.

3. Defendant admits the allegations of paragraph 3 but states that as of August 31, 1962, Blount Brothers Construction Company was merged into Blount Brothers Corporation, also a Delaware corporation.

4. Defendant admits the allegations of paragraph 4.

5. Defendant admits that it entered into a subcontract with plaintiff for the performance of the masonry work required under the terms of the above-mentioned prime contract, but states that the subcontract was dated April 20, 1961 and not December 8, 1961, as alleged; and defendant denies that plaintiff performed extra or additional work for the defendant in connection with the prime and sub-contracts.

6. Defendant denies the allegations of paragraph 6.

7. Defendant admits that it has refused to pay plaintiff the sum stated, or any other sum, and denies that any amount is owing to plaintiff because of defendant's counterclaim against plaintiff hereto annexed.

SECOND DEFENSE

The subcontract between plaintiff and defendant (attached as Exhibit A to the Counterclaim hereto annexed) contains the following provision

> "Article XIII—If any question of fact shall arise under this contract and there is no provision for settlement in the General Contract, then either party hereto may demand an arbitration by reference to a board of arbitration, to consist of one person selected by Contractor, and one person selected by Subcontractor, and these two to select a third; and in case these two shall fail to select a third within three days, either party hereto shall have the right to request that the third arbitrator be named by the American Arbitration Association. In case either party fails to name an

arbitrator within three days after requested to do so, then the other party shall have the right to request the American Arbitration Association to name an arbitrator to represent the party so failing to name one. The written decision of any two of this Board shall be final and binding on both parties hereto. Each party shall pay one-half of the expense of such reference." (Subcontract No. 535-11, p. 5)

Defendant has duly demanded arbitration pursuant to the above-quoted provision of the subcontract and plaintiff has refused to submit the controversy to arbitration. Until the questions of fact involved have been submitted to arbitration the court is without jurisdiction over the subject matter and this action must be stayed pending arbitration pursuant to the provisions of the Federal Arbitration Act, Title 9, U.S.C.

COUNTERCLAIM

1. Plaintiff is an individual, a citizen of North Carolina, doing business as Troitino Construction Company. Defendant and counterclaimant, Blount Brothers Construction Company, a Delaware corporation, was as of August 31, 1962, merged into Blount Brothers Corporation, also a Delaware corporation. The amount in controversy under the instant counterclaim is in excess of ten thousand dollars, exclusive of interest and costs.

2. On or about April 20, 1961, plaintiff and defendant entered into a subcontract under a prime contract between defendant and the District of Columbia for construction of a project known as the "Southwest Freeway, Inner Loop—Center Leg Connection, Railroad Structures and Roadways", whereby plaintiff agreed to perform the stone and masonry work required under defendant's prime contract. Copy of the subcontract between plaintiff and defendant is hereto attached as Exhibit A. (Note: The subcontract is

attached to the Supplemental Motion to Enforce Arbitration Agreement etc. J.A. p. 14)

3. Plaintiff furnished to defendant a performance bond, executed on behalf of plaintiff by the Travelers Indemnity Company, a Connecticut corporation, copy of which bond is attached hereto as Exhibit B. (Note: The performance bond is not printed).

4. Plaintiff failed to perform the work required by its subcontract with defendant within the time provided for by the subcontract. As a result, defendant has sustained damage in the amount of three hundred thousand dollars ($300,000.00).

WHEREFORE, defendant demands judgment against plaintiff in the sum of three hundred thousand dollars ($300,000.00), plus interest and costs, including attorneys' fees.

/s/ FREDERICK A. BALLARD
Frederick A. Ballard
912 American Security Building
Washington, D. C. 20005

/s/ FRANK H. McFADDEN
Frank H. McFadden
1500 Brown-Marx Building
Birmingham, Alabama 35203

Attorneys for Defendant

[Filed November 23, 1965]

Order Denying Motion for Rehearing of Defendant's Motion to Enforce Arbitration Agreement and for Stay of Further Proceedings Pending Arbitration

Upon consideration of motion for rehearing of defendant's motion to enforce arbitration agreement and for stay of further proceedings herein pending arbitration, and for rehearing of the Court's order of November 5, 1965, denying such motion, it is by the Court this 23rd day of November, 1965,

ORDERED, that such motion for rehearing be, and the same is hereby, denied.

/s/ JOSEPH C. MCGARRAGHY
Judge

[Filed December 3, 1965]

Notice of Appeal

Notice is hereby given that Blount Brothers Construction Company, defendant above-named, hereby appeals to the United States Court of Appeals for the District of Columbia from the Order Denying Supplemental Motion To Enforce Agreement For Arbitration, etc. entered in this action on November 5, 1965.

/s/ FREDERICK A. BALLARD
Frederick A. Ballard
912 American Security Building
Washington, D. C.
Attorney for Appellant, Blount Brothers Construction Company

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19889

BLOUNT BROTHERS CONSTRUCTION COMPANY, *Appellant*

v.

JOSEPH TROITINO, doing business as TROITINO CONSTRUCTION COMPANY, *Appellee*

PETITION FOR REHEARING BY THE HEARING DIVISION OR EN BANC

Appellant respectfully petitions the Court for rehearing of its decision of February 10, 1967, dismissing this appeal for lack of jurisdiction. In the alternative, appellant petitions for rehearing *en banc,* since three other divisions of this Court have recently decided the identical issue the other way (including this case, on the motion for summary affirmance).

I. The Court has departed from the law of the case.

The Court has dismissed the appeal herein on the ground that the denial of a motion to enforce an arbitration agreement and for a concomitant stay is not equivalent to an order refusing an injunction under 28 U. S. Code section 1292(a)(1). This was the ground for appellee's mo-

tion for summary affirmance herein, which was denied by another division of this court on June 29, 1966. In view of the nature of the issue, we submit that this action resulted in *res adjudicata* or law of the case. It was for that reason that this point was not again discussed on appellant's brief or, except in passing, on the argument.

Doubtless the denial of a motion for summary affirmance does not necessarily result in *res adjudicata* as to the particular issue involved, and may mean only that the court desires to consider the point more fully at the argument. In this case, however, we had assumed, and now submit, that *res adjudicata,* or law of the case, did so result since the narrow question involved had to be answered yes or no in order for the case to proceed. That is, the granting or refusal of a motion to enforce an arbitration agreement either is or is not equivalent to the granting or refusal of an injunction under section 1292(a)(1). The Supreme Court has held that it is so equivalent if issued, as here, in a common-law action, *Shanferoke C. & S. Corp.* v. *Westchester S. Corp.,* 293 U.S. 449 (1935). Justice Brandeis there stated:

> "For the reasons stated in *Enelow* v. *New York L. Ins. Co.* No. 47 [293 U.S. 379, ante, 440, 55 S. Ct. 310] an order granting or denying a stay based on an equitable defense or cross-bill interposed in an action at law under § 274b, U.S.C. title 28, § 398, is appealable under § 129. We are of the opinion that the special defense setting up the arbitration agreement is an equitable defense or cross-bill within the meaning of § 274b; and that the motion for a stay is an application for an interlocutory injunction based on the special defense." 293 U.S. at 452.

The *Shanferoke* decision was reaffirmed by the Court in *Baltimore Contractors* v. *Bodinger,* 348 U.S. 176, 184-5 (1955), which case was fully discussed and followed on this point by this Court in *Travel Consultants, Inc.* v. *Travel Management Corporation,* — U.S. App. D.C. —, 367 F. 2d 334 (1966), decided September 28, 1966.

The Court cites *Switzerland Cheese Ass'n* v. *Horne's Market,* 385 U.S. 23 (1966), which deals with the question of appealability of an order denying a motion for summary judgment for a permanent injunction against an alleged infringement of trademark. The Supreme Court held that the order was not appealable under section 1292(a)(1) because not interlocutory within the meaning of section 1292(a)(1); whereas here, as the Court states, "The order appealed from is indubitably interlocutory." (Slip opinion, page 3). Denial of a motion for summary judgment, because of the presence of factual questions, is of course entirely different from the refusal to enforce an agreement to arbitrate, see *Chappell & Co.* v. *Frankel,* 367 F. 2d 197 (C.A. 2, 1966). Even if this were doubtful, it will be noted that the Supreme Court did not consider it was overruling the arbitration cases above-mentioned since it cites *in support* of its decision the latest of those cases, *Baltimore Contractors Inc.* v. *Bodinger,* supra, see 385 U.S. 23 at 24. Plainly the arbitration cases are *sui generis* in respect to appealability, since if the case has to be tried to a court or jury, then obviously the agreement of the parties to arbitrate (in order to avoid the expense and delay involved in such a trial) has been violated beyond repair by later appeal after final decision on the merits.

II. The Hearing Division has failed to follow the recent decisions of two other divisions of this Court on the identical issue here involved.

In addition to the denial of summary affirmance on this point in the instant case, the Supreme Court decisions on the point here involved have recently been followed by two other divisions of this court: *Carey* v. *Carter,* 120 U.S. App. D.C. 182, 344 F. 2d 567 (1965); *Travel Consultants, Inc.* v. *Travel Management Corporation,* — U.S. App. D.C. —, supra, 367 F. 2d 334 (1966). Both decisions involve this identical issue, and the opinions speak for themselves.

Conclusion

The point on which the Court has dismissed this appeal was not argued to any extent because counsel assumed it to have been settled on the motion for summary affirmance. Appellant accordingly respectfully petitions for rehearing by the hearing division. In the alternative, appellant petitions for rehearing by the court *en banc* since the contrary result has been reached, and recently, by three other divisions of the Court.

Respectfully submitted,

FREDERICK A. BALLARD
912 American Security Building
Washington, D. C. 20005

FRANK H. McFADDEN
1500 Brown-Marx Building
Birmingham, Alabama 35203
Attorneys for Appellant

Certificate of Counsel

I hereby certify that the above Petition for Rehearing is presented in good faith and not for purposes of delay.

FREDERICK A. BALLARD

Certificate of Service

I certify that a copy of the foregoing petition has this 27th day of February, 1967, been served by mail on Kahl K. Spriggs, Esq., 504 Southern Building, Washington, D. C. 20005, attorney for appellee.

FREDERICK A. BALLARD

BRIEF FOR APPELLEE AND APPELLEE'S APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,8~~88~~ 6557

BLOUNT BROTHERS CONSTRUCTION COMPANY,
Appellant,

v.

JOSEPH TROITINO,
doing business as
TROITINO CONSTRUCTION COMPANY,
Appellee.

APPEAL FROM ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

KAHL K. SPRIGGS
JOHN F. MYERS
504 Southern Building
Washington, D.C. 20005
Attorneys for Appellee.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Is an order denying a stay pending arbitration appealable under Title 28, United States Code, Section 1292 (a)(1); and subsidiarily, is such order appealable when the denial amounted to denial of motion for summary judgment?

2. Did not Blount waive right to arbitrate by asking the court below for relief on the merits not only in the instant case, but also in a separate proceeding wherein it elected to prosecute in court, against both Troitino and his surety, the same counterclaim as in the instant case?

3. Is not Blount's counterclaim for alleged breach of contract delay damages not arbitrable under its narrow arbitration clause limited only to questions of fact arising under the subcontract and also not including questions of law?

4. Did not Blount make an insufficient showing below for stay or for arbitration?

5. Was the stonework subcontract a transaction involving interstate commerce within the restricted Section 2 of the Federal Arbitration Act?

INDEX

TABLE OF CITATIONS

CASES:

* Authorities chiefly relied upon are marked by asterisk.

OTHER REFERENCES:

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,889

BLOUNT BROTHERS CONSTRUCTION COMPANY,
Appellant,

v.

JOSEPH TROITINO,
doing business as
TROITINO CONSTRUCTION COMPANY,
Appellee.

APPEAL FROM ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF CASE

On May 24, 1965, Joseph Troitino, a citizen of North Carolina, doing business as Troitino Construction Company, brought suit in the United States District Court for the District of Columbia against Blount Brothers Construction Company, a Delaware corporation, whose principal place of business was in Montgomery, Alabama, to recover the sum

of $82,397.26 for breach of subcontract. (J.A. 5).[1] Blount was served with process on June 5, 1965 (J.A. 2) and under date of June 9, 1965 wrote Troitino as follows (A.A. 2):

> "Pursuant to Article XIII of Subcontract No. 535-11, dated April 20, 1961, between your company and Blount Brothers Construction Company, we hereby demand arbitration of all disputes between the parties thereunder.
>
> "Our counsel will be in touch with your counsel promptly with respect to naming the arbitrators."

On June 15, 1965, Blount filed motion to enforce agreement for arbitration and for stay of further proceedings pending arbitration, which Troitino opposed by written points and authorities. After hearing, Judge Youngdahl denied the motion to stay without prejudice to Blount's making a new motion "containing a proper and complete factual and legal foundation," the order reciting that Blount had not made a sufficient showing that the action contained an "issue referable to arbitration."

On August 3, 1965, Blount filed a supplemental motion to enforce agreement for arbitration and for stay, with affidavits and copy of subcontract. Troitino opposed such motion, which came on before Judge Jones on August 26th, who, after argument, continued the matter for a further showing by Blount (While the docket entries do not contain this, the jacket entry shows the fact of argument and continuance.).

On October 28, 1965, the supplemental motion was argued before Judge McGarraghy, who on November 5th denied it; also denying Blount's request for admissions, which had been objected to and opposed by Troitino.

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[1] While appellant has designated the Appendix to its brief as a Joint Appendix, it did not print the portions of record designated by Troitino, who has been obliged to print an Appellee's Appendix (AA). Reference herein to Joint Appendix is therefore simply for convenience.

On November 15, 1965, Blount answered Troitino's complaint and also filed its counterclaim demanding $300,000.00 against Troitino for alleged breach of subcontract delay damages. On November 15th, Blount also moved the court below to bring in The Travelers Indemnity Company, Troitino's surety, as an additional party respecting the counterclaim, which was granted November 15th, and Travelers was brought in by service of summons and complaint upon it on November 24th (A.A. 4-7).

On November 16, 1965, Blount moved for rehearing of its motion to enforce arbitration agreement and for stay, to which Troitino filed statement as well as points and authorities in opposition (A.A. 7-9). On November 23rd, motion for rehearing was denied. On November 29th, Troitino's answer to counterclaim was filed (A.A. 12-15).

Troitino brought an action in the United States District Court for the District of Columbia, Civil Action No. 1807-65, styled District of Columbia to the use of Joseph Troitino, etc., originally against Blount's surety, United States Fidelity and Guaranty Company, relative to another subcontract with Blount on the Potomac Sewerage Pumping Station project, the instant suit below being on what is known as the Southwest Freeway project. In Civil Action No. 1807-65, counsel for United States Fidelity and Guaranty Company, who is the same counsel appearing for Blount in the instant case, represented to the court below (on oral hearing of motion to dismiss because Blount was not joined as a party defendant) that Blount desired to file a counterclaim, not arising out of that subcontract, but out of the subcontract on the Southwest Freeway project. Judge Holtzoff dismissed the complaint with leave to amend and the amended complaint named as an additional party defendant, Blount Brothers Construction Company. Blount has filed the same counterclaim in that case, as it has in this one, and on November 15, 1965, the court below entered an order bringing in Travelers Indemnity Company as an additional party defendant on the counterclaim, on a motion by

Blount stating that in order to insure complete relief under the counterclaim, the bringing in of Travelers as a party defendant was necessary (A.A. 7-9).

STATUTES INVOLVED

The following sections of the United States Code, as amended, and of the State of Alabama, are involved:

Title 9, Section 2:

> **Validity, irrevocability, and enforcement of agreements to arbitrate**
>
> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. July 30, 1947, c. 392, § 1, 61 Stat. 669.

Title 9, Section 3:

> **Stay of proceedings where issue therein referable to arbitration**
>
> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not

in default in proceeding with such arbitration. July 30, 1947, c. 392, § 1, 61 Stat. 669.

Title 9, Section 9:

Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. July 30, 1947, c. 392, § 1, 61 Stat. 669.

Title 28, Section 1292(a)(1):

Interlocutory decisions

(a) The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for

> the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court.

Volume 4, Title 9, Section 51, Code of Alabama, recompiled 1958 (6829):

> **Section 51. No remedy unless mutual.** — Neither party to an obligation can be compelled specifically to perform it, unless the other party thereto has performed, or is compelled specifically to perform, everything to which the former is entitled under the same obligation, either completely or nearly so, with full compensation for any want of performance.

Section 55 of aforesaid Title 9 (6683):

> **Section 55. What cannot be specifically enforced.** — The following obligations cannot be specifically enforced: * * *
>
> an agreement to submit a controversy to arbitration; * * *

STATEMENT OF POINTS

1. An order denying a stay pending arbitration is not appealable under Title 28, United States Code, Section 1292(a)(1), as an order denying an injunction; and subsidiarily, such order is not appealable when the denial amounted merely to denial of motion for summary judgment.

2. Blount waived its right to arbitrate by asking the court below for relief on the merits, not only in the instant case, but also in another suit in the court below against it wherein Blount elected to prosecute therein the same counterclaim against both Troitino and his surety, as in the instant case.

3. Blount's counterclaim for alleged breach of contract delay damages is not arbitrable under its own form of narrow arbitration clause, restricted specifically to questions of fact arising under the subcontract and also not including questions of law.

4. Blount made an insufficient showing below for stay or for arbitration. The stonework in the District of Columbia was not a transaction involving interstate commerce within the restricted Section 2 of the Federal Arbitration Act.

SUMMARY OF ARGUMENT

I

The order of the court below dated November 5, 1965, from which this appeal was taken, is not an appeal of an order under Title 28, United States Code, Section 1292(a)(1). The order was simply interlocutory and was not the equivalent of denying an injunction. The question of jurisdiction is always open, particularly in regard to piecemeal appeal made under the asserted authority of the interlocutory appeal statute. In view of *Morgantown*, *Baltimore Contractors*, and *Goodall-Sanford* cases, there is no vitality to Shanferoke, on which appeal relies.

Because statements of counsel, affidavits and other documents were presented to the court below, Blount's motion was one for summary judgment, which was denied. An order denying motion for summary judgment is not appealable. Accordingly, the appeal should be dismissed.

II

Blount waived any asserted right to arbitrate its breach of contract delay damages claim by seeking and taking steps actively to prosecute that claim in the court below against Troitino and his surety, The Travelers Indemnity Company, in another action in that court, as well as against both those parties in this case below. Blount has thus sought to

proceed in court and at the same time has asked the court to stay its hand. Blount has thus waived any right under any circumstances to arbitrate its counterclaim, since arbitration can be waived, as this Court has held.

III

Blount's claim or counterclaim for delay damages for alleged breach of subcontract does not constitute a question of fact arising under the subcontract and it is also not arbitrable by virtue of the provisions of the subcontract. Blount in the subcontract form prepared by it intentionally did not use the standard form of American Arbitration Association which covers all controversies and claims arising out of or relating to the contract, or to the breach thereof. Blount modeled its arbitration clause on the standard form of Federal Government disputes clause, tailoring it and adapting it to its particular purposes. Under long-standing construction by the appeal boards of the Federal Agencies, by the Court of Claim and by the Supreme Court at the last term, in the *Utah Construction and Mining Company* case, "questions of fact arising under this contract" excluded breach of contract claims in general and particularly breach of contract claims for delay damages. Non performance of an obligation, if the obligation exists at all, is a violation or breach thereof and a suit or claim for damages for such violation or breach does not arise under, but outside of or in relation to the contract. Blount's form of subcontract in recognition thereof specifically reserved breach of contract claims from being arbitrated.

The subcontract was made in the State of Alabama, the municipal law of that state therefore being incorporated therein, particularly as to intention of the parties. By Alabama statute, an agreement to submit a controversy to arbitration may not be specifically enforced, nor by statute may an agreement which lacks mutuality be enforced. Thus, both under Federal law and that of Alabama, the intention of the parties, by

the words used, as well as the face of the subcontract itself, excluded the only claim which Blount sought to have arbitrated.

The measure and elements of damages in breach of contract actions concern questions of law and are excluded from the arbitration article. Blount, as shown by its counterclaim, seeks general delay damages in the unliquidated amount of $300,000, none of which is within the arbitration clause of the subcontract.

IV

For other reasons, the order of the court below should be sustained.

1. Blount made no showing sufficient under 9 U.S.C., Section 3 for reference to arbitration. It filed no answer to the complaint until after several presentations of its motion had failed to convince three Judges of the court below of the merits of its position. Its affidavits were not sufficient, were controverted by statements of counsel, and the affidavit of one of its own counsel consisted of legal conclusions and obviously was not upon personal knowledge and information of any operative facts. Further, Blount chose to withhold its answer and counterclaim until after it had failed on three different occasions before three different Judges to make the necessary statutory showing.

2. The subcontract, having been made in Alabama, the municipal law of that State in regard to intention of the parties respecting the words used is incorporated into the subcontract. An agreement to submit controversy to arbitrate under Alabama law is not enforceable, nor is it enforceable in the District of Columbia. Both Federal and municipal law are contrary to Blount's contentions and fully sustain the order below.

3. The subcontract is not a transaction involving interstate commerce within the restricted Section 2 of the Federal Arbitration Act. Troitino's subcontract was for the stonework. Although the stone came from Georgia, it was set in the District of Columbia and remains here.

V. Appellant's Brief

Contrary to Blount's contentions, whether or not a party is bound to arbitrate, as well as the issues it must arbitrate, is a matter to be determined on the basis of the contract entered into between them. Agreement to arbitrate must rest on a clear, definitive agreement of the parties and their intention to submit their disputes outside the courts must be made manifest by plain language.

A movant for summary judgment has the burden of establishing entitlement thereto. Aside from the interstate commerce aspect, there was no showing by pleadings or by competent affidavit sufficient to countervail the objection thereto or even *prima facie* to warrant granting of the motion.

ARGUMENT

I.

The Order of the Court Below Dated November 5, 1965 (JA 30) From Which This Appeal Was Taken (JA 31) Is Not an Appeal of an Order Under Title 28 of the United States Code, Section 1292 (a) (1); and It Is Also Not Appealable Because in Such Order the Court Below Merely Denied What, in Reality, Was a Motion for Summary Judgment.

Notwithstanding the order of this Court, dated June 29, 1966, denying appellee's "motion for summary affirmance," appellee, Troitino, moves that the appeal be dismissed because it is not appealable under Title 28 of the United States Code, Section 1292 (a) (1), and additionally, that the order appealed from was simply a denial of a motion for summary judgment for enforcement of an alleged arbitration agreement and for stay pending arbitration. As such, the complained of order of the court below was interlocutory and was not the equivalent of denying an injunction. *John Thompson Beacon Windows, Ltd. v. Ferro, Inc.*, 98 U.S.

App. D.C. 109, 232 F.2d 366; *Division 689, Amalgamated Ass'n, etc. v. Capital Transit Company,* 97 U.S. App. D.C. 4, 227 F.2d 80; *Turkish State Railways Administration v. Vulcan Iron Works,* 230 F.2d 108.

The question of jurisdiction is always open, especially in regard to piecemeal appeal made under asserted authority of the interlocutory appeal statute, itself a limited exception to the finality for appealability rule. Moreover, it should be observed that the motion was made in a pending case under 9 USC of the Arbitration Act and not as a separate proceeding under 9 USC 4.[2]

In view of *Morgantown v. Royal Insurance Company,* 337 U.S. 254, 93 L. ed. 1347, 69 S. Ct. 1067; *Baltimore Contractors v. Bodinger,* 348 U.S. 176, 99 L. Ed. 233, 75 S. Ct. 249; *Schoenamsgruber v. Hamburg American Line,* 294 U.S. 454, 79 L. ed. 989, 55 S. Ct. 475; and *Goodall-Sanford v. United Textile Workers,* 353 U.S. 550, 1 L. ed. 2d 1031, 77 S. Ct. 920, there appears now to be no vitality to Shanferoke (based on Enelow).[3] In the *Morgantown* case, *supra,* the Supreme Court said (337 U.S. p. 257):

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[2] The issues relate to counterclaim asserted by Blount.

[3] See also Report on Senate Judiciary Committee on H.R. 9730, which became Act of September 3, 1954, amending Section 4 of Title 9, USC, which states in part (1954 US Congressional and Administrative News, page 3999):

> "Finally, the amendment provides that if the question as to whether the arbitration agreement was made, or as to whether there was a failure, neglect or refusal to perform it, is the issue and the party allegedly in default demands a jury trial, the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. Under the present provision, the referral shall be 'in the manner provided by law for referring to a jury issues in an equity action,' or the court 'may specially call a jury for that purpose.' As stated above, the Federal Rules of Civil Procedure merged actions at law and equitable actions into one form of action, known as a 'civil action.' Those rules provide the manner for jury trials, whether on demand or otherwise. See, particularly, Rules 38 and 39."

(*Continued, next page*)

> "* * * The fiction of a court with two sides, one of which can stay proceedings in the other, is not applicable where there is no other proceeding in existence to be stayed. The ruling from which the appeal in this case was prosecuted is an order interlocutory in form and substance. Nothing in the language of the rules or the Judicial Code brings it within the class of appealable decision, and distinctions from common-law practice which supported our conclusions in the Enelow and Ettelson Cases supply no analogy competent to make an injunction of what in any ordinary understanding of the word is not one."

In *Baltimore Contractors, supra,* the Court said (348 U.S. at 184):

> "The reliance on the analogy of equity power to enjoin proceedings in other courts has elements of fiction in this day of one form of action. The incongruity of taking jurisdiction from a stay in a law type and denying jurisdiction in an equity type proceeding springs from the persistence of outmoded procedural differentiations. Some simplification would follow from an assumption or denial of jurisdiction in both. The distinction has been applied for years, however, and we conclude that it is better judicial practice to follow the precedents which limit appealability of interlocutory orders, leaving Congress to make such amendments as it may find proper."

The Court in *Lummus, supra,* differentiated between a refusal of injunction within the meaning of the interlocutory appeal statute and the denial or granting of a stay pending arbitration.

This Court specifically held in the *Ferro* case, *supra,* that the inter-

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(Fn. 3, cont'd)

This is a legislative expression of further evolution in the merger of former actions at law and in equity into a single civil action, particularly respecting the Arbitration Act. The recent merger of the Admiralty rules into the civil rules is a still further judicial expression of intention that all actions shall be merged with and proceed as in one form of civil action.

locutory appeal statute was inapplicable to overruling motion to compel arbitration and it was followed by a decision of this Court to the same effect in *Division 689, etc. v. Capital Transit Company, supra.* While in *Carey v. Carter,* 120 U.S. App. D.C. 182, 344 F.2d 567, the Court entertained an appeal from denial of a stay pending exhaustion of contractual grievance procedures, it returned the case for additional hearing. In *Carter,* the Court made no mention of its previous decisions in the *Ferro* and *Division 689* cases, nor of the Supreme Court cases above cited. Labor arbitration cases, generally, however, are, it must be recognized, *sui generis,* and particularly in this respect. See *Goodall - Sanford v. United Textile Workers, supra.*

Piecemeal appeals are not favored.[4]

The order below was simply another step in the case, was interlocutory, was not equivalent to refusing an injunction, and was not appealable.

For another reason, the appeal should be dismissed. On several occasions, statements of counsel, affidavits and other matters were presented to the court below. The motion thus took on the character of a motion for summary judgment, which was denied. Rule 12(b) of the Federal Rules of Civil Procedure. There was no separation of the motion to enforce arbitration agreement from the mere ancillary motion to stay. The denial of the motion to compel arbitration obviated stay. No separate stay was sought by Blount. Under such circumstances, the order is not appealable. *Division 689, etc. v. Capital Transit Co., supra; Morgenstern Chemical Co. v. Schering Corporation,* 181 F.2d 160.

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[4] Cf. *United States v. New York, New Haven & Hartford Railroad,* 276 F.2d 525, dissenting opinion of Clark, Circuit Judge, pp. 549-553.

II.

Blount Waived Any Asserted Right To Arbitrate Its Breach of Contract Delay Damages Claim.

Blount waived any asserted right to arbitrate its claim against Troitino for alleged breach of contract delay damages, by taking steps actively to prosecute that claim against Troitino and his surety, The Travelers Indemnity Company, in Civil Action No. 1807-65 in the court below (AA 7-8), as well as against both in this case.

In Civil Action No. 1807-65, Troitino brought suit in the court below against Blount's surety under Section 1-804, District of Columbia Code, to recover balance due on another subcontract with Blount relating to the Potomac Sewerage Pumping Station project. In that case, counsel for the surety, who are the same counsel appearing for Blount in the instant case, after filing motion to dismiss on oral hearing thereof, represented to the court below that Blount desired to file a counterclaim, which is the same one it finally filed in this case. Judge Holtzoff dismissed the complaint with leave to amend, and the amended complaint named Blount as an additional party defendant. Blount filed the same counterclaim in that case as it has in this one and on November 15, 1965, the court below entered an order on Blount's motion, bringing in The Travelers Indemnity Company, Troitino's surety, as an additional party defendant on the counterclaim, pursuant to a motion by Blount stating that in order to insure complete relief under the counterclaim, it was necessary to bring in Travelers (AA 4, 6-8). The counterclaim in Civil Action No. 1807-65 was permissive, i.e., it was interposed at the election of Blount. By seeking to have itself made a party defendant in that action, Blount voluntarily elected to prosecute it in the court below and invoked its jurisdiction for relief not only against Troitino but also against his surety, Travelers.

Moreover, Blount has likewise sought relief from the court below

and invoked its jurisdiction to bring in Travelers as an additional party defendant to prosecute the counterclaim against it in the instant case, Civil Action No. 1253-65, again representing in its motion to that end that such was necessary in order to insure complete relief under the counterclaim.

In Civil Action No. 1807-65, the Potomac Sewerage Pumping Station suit, neither Blount nor its surety (represented by the same counsel) sought a stay pending the arbitration which it seeks.

Under such circumstances, Blount has waived any right in any event to arbitrate the subject of its counterclaim. Arbitration, like any other contract right, can be waived. Such right is waived when the one seeking arbitration actively participates in a lawsuit or takes other action inconsistent therewith. *Cornell & Co., Inc. v. Barber & Ross Co.*, No. 19660, decided April 14, 1966, __ U.S. App. D.C. __, __ F.2d __; *E. I. DuPont de Nemours & Co. v. Lyles & Lang Construction Co.*, 219 F.2d 328, 334, cert. den., 349 U.S. 956, 99 L. ed. 1280, 75 S. Ct. 882.

III.

Blount's Claim or Counterclaim for Delay Damages for Alleged Breach of Subcontract Does Not Constitute a Question of Fact Arising Under the Subcontract and Is Not Arbitrable by Virtue of the Provisions of the Subcontract.

1 (a). The standard form of arbitration clause of the American Arbitration Association is as follows (AA 4):

> "Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration in accordance with the Rules of the American Arbitration Association, and judgment upon the award rendered by the Arbitrator(s) may be entered in any Court having jurisdiction thereof."

Blount's restricted form of arbitration clause, carefully drawn by its counsel, is as follows (JA 26, AA 10):

"Article XIII—If any question of fact shall arise under this contract and there is no provision for settlement in the General Contract, then either party hereto may demand an arbitration by reference to a board of arbitration, to consist of one person selected by Contractor, and one person selected by Subcontractor, and these two to select a third; and in case these two shall fail to select a third within three days, either party hereto shall have the right to request that the third arbitrator be named by the American Arbitration Association. In case either party fails to name an arbitrator within three days after requested to do so, then the other party shall have the right to request the American Arbitration Association to name an arbitrator to represent the party so failing to name one. The written decision of any two of this Board shall be final and binding on both parties hereto. Each party shall pay one-half of the expense of such reference."

The Federal Government standard form of disputes clause of procurement contracts, in material part, is as follows:[5]

"Article 15. Disputes.—

"Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed."

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[5] *United States v. Utah Construction and Mining Company* (Footnote 2) 384 U.S. 394, 399, 16 L.ed.2d Adv.Rpts. 642, 648, 86 S. Ct. 1545, 1548. Subsequent to the passage of the "Wunderlich Act" (May 11, 1954), 41 USC 321, 322, additional provisions not relevant here were added to conform to the Act. 41 USCA Appendix par. 1-7.101-page 541-12. Disputes.

Blount's form of restricted and limited arbitration article is significant not only for what it said but also for that which it carefully and deliberately omitted. It is clear Blount did not adopt the American Arbitration Association provisions, with which presumably its counsel were fully familiar, as they appear in many reported cases. Indeed, Blount's form refers to the American Arbitration Association, and it is common knowledge the AAA form is available on request. Controversies or claims "relating to" the subcontract or the "breach thereof" were omitted. Moreover, Blount's Article XIII arbitration clause, taken in conjunction with other provisions of the subcontract, seems to be limited to questions of fact arising during performance. Here both the prime and subcontract work were completed and accepted by the District of Columbia long before the suit was filed.

A reading of the subcontract, including particularly Articles III and XV (JA 18, 26-27, AA 9, 10) shows that all it attempted to do in the event Blount claimed delay damages was to try to set up a colorable excuse for withholding payment to Troitino pending prosecution of Blount's claim in court for delay damages for alleged breach of the subcontract. There is no provision in the subcontract for delay damages other than Article III (c) and XV (d).

The counterclaim demands general breach of contract delay damages.[6] Thus, Blount is pursuing its rights at law outside of the contract, which the subcontract reserved for court action by Blount under Article XV (e) reading as follows: [7]

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[6] The original subcontract price was $313,336.40 (AA 9). The unpaid balance claimed by Troitino was $82,392.26. The delay damages breach of contract claim by Blount is $300,000.00.

[7] It should be observed that Troitino was precluded by Article III (e) of the subcontract from suing for delay damages; hence, it was necessary to refer only to Blount in the reserving and exclusionary Article XV (e). But, Article XIII says *either party may demand arbitration*, whereas Article XV (e) is to the contrary. Thus either the arbitration clause is nullified as to Blount's breach of contract

> "(e) The rights and remedies granted to Contractor under this article and those granted to the Contractor pursuant to the other provisions of this subcontract shall be cumulative and are not intended to be in lieu of any legal right or remedy which Contractor may have against Subcontractor for breach of this subcontract or default hereunder afforded by state or federal law."

Accordingly, on the face of Blount's standard form of subcontract, its counterclaim for delay damages for alleged breach thereof is not referable to arbitration.

The form subcontract would be construed strictly against Blount, which prepared it. But the matter need not rest there.

It has long been held by the boards of appeals of the Federal Agencies, by the Court of Claims, and now by the Supreme Court of the United States, that a claim for delay damages for breach of obligation, express or implied, assumed in the contract, is not a dispute concerning a question of fact arising under the contract; hence, not within the jurisdiction of the arbiter named in the disputes clause, the arbitration clause (Article 15) of the standard form of Federal Government procurement contract. *Utah Construction and Mining Co. v. United States,* 168 C. Cl. 522, 339 F.2d 606; *United States v. Utah Construction and Mining Company,* 384 U.S. 394, 399, 16 L. ed. 2d Adv. Rep. 642, 648, 86 S. Ct. 1545, 1548.

In the Court of Claims *Utah,* plaintiff had a contract with the Atomic Energy Commission to construct an assembly and maintenance area. The contract was fully performed. During the course of performance and after its completion, Utah made various claims for increased costs and

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delay damages claim or such claim was expressly excluded from the scope of Article XIII. Specific performance is not available to Blount under such circumstances. Vol. 4, Title 9, Code of Alabama, 1958 recompiled, Secs. 51 and 53. The words breach, default, and damages employed by Blount in Articles III and XV are breach of contract terms.

for damages, some of which were claims arising under the contract and some for alleged breaches of the contract by the Government on account of delays and other causes. The case came before that Court in regard to controversy defining the scope of the testimony to be taken before one of its commissioners, in the light of the decision in *United States v. Bianchi,* 370 U.S. 709. The Court said:

> "Where the dispute 'arises under the contract' the contracting officer and the head of the department have authority to decide questions of fact and the contract makes their decision thereon final and conclusive; but where the dispute involves an alleged breach of the contract, and the contractor seeks unliquidated damages therefor, neither the contracting officer nor the head of the department has jurisdiction to decide the dispute. *Miller, Inc. v. United States,* 111 Ct. Cl. 252, 77 F. Supp. 209 (1948); *Langevin v. United States,* 100 Ct. Cl. 15 (1943); *Beuttas v. United States,* 101 Ct. Cl. 748 (1944), reversed in part on other grounds, *United States v. Beuttas, et al.,* 324 U.S. 768 (1944). If they undertake to do so — which they rarely do — neither their decision nor the findings of fact with reference thereto have any binding effect. This necessarily follows because they are without authority to decide the dispute. It goes without saying that a decision of any court or other agency on a matter concerning which it has no jurisdiction has no binding effect whatsoever. *Steamship Co. v. Tugman,* 106 U.S. 118, 122 (1882); *Coyle v. Skirvin,* 124 F.2d 934, 937 (10th Cir. 1942), and cases there cited. See also *Petition of Taffel,* 49 F. Supp. 109, 111 (S.D. N.Y. 1941).
>
> "Defendant contends that since the contract gives to the contracting officer and the head of the department authority to make findings of fact concerning *all* disputes, they have to make findings of fact concerning a dispute over whether the contract had been breached. This contention cannot be sustained. The contract plainly limits their authority to make such

> findings to 'disputes concerning questions of fact ~~aris~~*ing under this contract.*' This means a dispute over the rights of the parties given by the contract; it does not mean a dispute over a violation of the contract."

The Court held (339 F.2d at p. 610) that an action for breach of contract was not within the scope of the disputes clause.

One of the claims, the concrete aggregate claim, arose because the concrete aggregate furnished to Utah by the Government did not have required strength and was dirty, so that plaintiff was obliged to add one sack of cement to each cubic yard of concrete mix during the time the Government was washing the concrete to bring it up to specification requirements. Utah was paid for the extra cement. It later filed a claim for additional costs because of the poor condition of the aggregate. The breach of contract increased costs or delay damages claim for non-performance of the Government's obligation respecting the aggregate was specifically held not to be within the scope of the disputes clause and not to be a dispute concerning a question of fact arising under the contract. The opinion further stated:

> "The Atomic Energy Commission's Advisory Board of Contract Appeals in the *Appeal of Utah Construction Company* (Docket No. 91) recognized its lack of jurisdiction to decide or to make findings concerning damages for breach of contract. It said:
>
> > 'It is clear, in the light of the Board's decision in Appeal of Claremont Construction Company (Docket No. 64), that, not only does the Contractor's Appeal on the issue of damages raise issues solely of law, but that this dispute is as to a matter "relating to" and not one "arising under" the contract. The Board has discussed this distinction at length in both that Claremont case and in Appeal of Frontier Drilling Company (Docket No. 74). The reasoning need not be repeated here. As to this issue, the appeal should

> be dismissed as not within the jurisdiction of the the Board'."[8]

All the Judges of the Court of Claims concurred in the view that breach of contract damages claims, delay damages or other damages claims do not raise questions of fact arising under the contract and are not subject to or within the coverage of the disputes clause, and the arbiters thereunder are without jurisdiction over them.

Attention is invited to the opinion of Judge Davis (concurring in part and dissenting in part). In rejecting the Government's contention that the disputes clause required that all factual matters connected with the contract — whatever the nature of the claim — be tried and determined only by the arbiter named therein, Judge Davis said:

> "1. I concur with the court in rejecting the Government's broad contention that the Disputes clause demands that *all* factual matters connected with the contract — whatever the nature of the claim — be tried and determined only by the agency board (or representative), with finality attaching to all those administrative factual findings which are adequately supported. That has never been the law during the long history of Disputes clauses. On the contrary, the finality of such findings has been recognized only when the board was considering a contractor's request under some contract provision (like the Changes, Changed Conditions, Termination for Default

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[8] In the Claremont appeal, AEC cited with approval in Utah both in the Court of Claims and in the Supreme Court, 384 U.S. at page 406. Robert Kingsley, then Dean of the Law School, University of Southern California and now Justice, Cal. Dist. Ct. App. 2d Dist., said, respecting the action of the contracting officer for the Government in determining delay damages to the AEC for delays in completing the contract, which Claremont disputed:

> "However, the Board is convinced that this issue is not a dispute that arises 'under' the contract and within the Board's jurisdiction, but rather is a matter of general law to be decided by a suit in the Court of Claims or in the District Court. (Cf. Appeal of Utah Leavell, Docket No. 51)."

or for Convenience, or Suspension of Work articles) expressly authorizing the agency to grant an adjustment in price or other specific relief in defined circumstances. These alone are disputed questions 'arising under' the contract. Exhaustion of the administrative remedy has not been required and finality has not been accorded where the facts relate to a type of claim, such as for a breach, which the contract does not commit to agency determination. Those disputes are connected with, but do not arise under, the contract. The administrative board can give no relief under the contract, and therefore cannot finally decide the facts.

"This was the accepted distinction before the Wunderlich Act of 1954, 68 Stat. 81, U.S.C. §§ 321-322.[1] There is certainly no ground for saying that that enactment changed this segment of Government contract law. The same rules have continued to be followed since the passage of that statute, both by the administrative agencies and by this court, explicitly and tacitly.[2] * * *." [9]

On review of the decision of the Court of Claims, the Supreme Court dealt with the issue of the scope of the disputes clause raised by the treatment by the Court of Claims of the concrete aggregate claim. In treating the issue of the coverage of the disputes clause, the Court remarked that if the Government was correct, the concrete aggregate claim was a proper subject for administrative handling even if the substandard aggregate was not a changed condition and even if the claim was for breach of warranty and delay damages. The Court rejected the contention of the United States that the disputes clause authorized and compelled administrative action concerning all disputes arising between the parties in the course of completing the contract. It reviewed the long history of the disputes clause and approved numerous earlier holdings

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[9] Footnotes 1 and 2 to the opinion of Judge Davis, citing numerous cases are omitted. See "Public Contracts and Administrative Law," Hon. Harold Leventhal, 52 American Bar Association Journal 35, 39, Footnote 32.

that the contractor need not process breach of contract claims through the disputes machinery before filing his court action. The Court also rejected the Government's alternative argument limiting the numerous rulings preventing breach of contract claims from being within the jurisdiction of the disputes clause to the question of availability of remedy. The Court recognized and approved the restrictive meaning of the words, "arising under this contract" as long established under the decisions of the boards and of the Court of Claims. The Court said (384 U.S. at p. 412):

> "Thus the settled construction of the disputes clause excludes breach of contract claims from its coverage, whether for purposes of granting relief or for purposes of making binding findings of fact that would be reviewable under Wunderlich Act standards rather than de novo."

The Supreme Court affirmed the decision of the Court of Claims in its interpretation of the scope of the disputes clause and the concrete aggregate claim was returned for *de novo* testimony subject to the rule of collateral estoppel to the extent it might be applicable.

Accordingly, it is seen that language "questions of fact arising under this contract" have been for many years and are universally recognized as words of art, restricted in their meaning and application and excluding breach of contract damages claims, all which must be deemed to have been imported into Blount's standard contract form. Blount is an experienced contractor on federal construction projects.[10] Blount's counsel, in preparing its subcontract form for Blount as an experienced contractor on Federal projects is presumed to be aware of the long-standing and well understood construction of the disputes clause. Also, the American Arbitration Association in recognizing those words as limited words of

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[10] *Blount Bros. Construction Co. v. United States*, 171 C. Cls. 478, 346 F.2d 962. Appeal of Blount Bros. Construction Co., 60-1 BCA 2634; Appeal of Blount Bros. Construction Co., 60-2 BCA 2664; Appeal of Blount Bros. Construction Co., 61-1 BCA 3055; *United States v. Blount Bros. Construction Co.*, 168 F. Supp. 407.

art has expressly broadened its arbitration clause to encompass thereunder full and complete jurisdiction, both as to law and fact.

The Supreme Court remarked in *Utah* that the coverage of the disputes clause is a matter susceptible of contractual determination. In tailoring the arbitration provision, Blount obviously used the Government disputes article as a model. It omitted the words, "all disputes concerning" in that form and substituted private arbitrators for the Government arbiters named in the disputes clause. Finally, in carefully tailoring Article XIII to its peculiar purposes, Blount refrained from using the American Arbitration Association arbitration clause, covering expressly "Any controversy or claim arising out of or relating to this contract, or the breach thereof, * * *" including also both law and fact in the broad language. Blount seeks arbitration of its own alleged claim for unliquidated damages for delay for alleged breach of contract, which is not within the coverage and scope of Article XIII.[11]

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[11]Subsequent to Supreme Court *Utah*, the Court of Claims in *Mauricio Hochschild, S.A.M.I. v. The United States*, No. 276-63 (decided July 15, 1966), said (footnote 2):

> "Although plaintiff sought an administrative remedy, the recovery sought is damages for breach (failure to accept delivery). There was no administrative remedy available under the terms of the contract. Damages must therefore be determined by this court, and not the administrative agency. The recent Supreme Court decision in *United States v. Anthony Grace & Sons, Inc.*, 384 U.S. 424 (1966) *Rev'g Anthony Grace & Sons, Inc. v. United States*, 170 Ct. Cl. 688, 345 F.2d 808 (1965), dictates referral back to the administrative agency for computation of damages in those instances in which the agency board had jurisdiction to hear the suit, and to grant the relief requested by the contractor. Such is not the case here."

See also Appeal of Christy Corporation, 1966 BCA par.-5630 in which a claim of contractor for alleged Government delay damages was dismissed as being without its jurisdiction. Appeal was decided post Supreme Court *Utah* and the Board said it would dismiss an appeal where it is grounded on breach of contract or where contract contains no provision under which the Board could provide the relief sought.

(b) The measure and elements of damages in breach of contract actions concern questions of law and likewise are not questions of fact arising under the contract. *Prudence Company v. Fidelity and Deposit Co. of Md.*, 297 U.S. 198, 80 L. ed. 581, 56 S. Ct. 387; *United States v. Behan*, 110 U.S. 338, 28 L. ed. 168, 4 S. Ct. 81; *Laburnum Construction Co. v. United States*, 163 C. Cls. 339, 325 F.2d 451; *Acme Process Equipment Co. v. United States*, 347 F.2d 509; *Keco Industries, Inc. v. United States* (C. Cls.) No. 276-56, decided July 15, 1966.[12] There is no need to belabor the matter. Law schools give courses on the subject of damages and textbooks are written on the subject by legal writers. Even as to amounts of damages — different from the measure of damages and recoverability of components thereof — when some method of computation or allocation is involved, legal considerations and principles govern.

(c) Questions of law have been excluded by Blount from its narrow arbitration article. Blount's counterclaim and Troitino's reply thereto raise questions of law. Among others, they involve the determination of what the contract was; the liability at all of Troitino for delay damages; the lack of any arbitration provision, if there was an oral contract on April 20, 1961; the legal conclusions to be drawn from the conduct of the parties, as well as waiver and estoppel. As stated, the obligation for arbitration and delay damages is denied. *E. I. DuPont de Nemours & Co. v. Lyles & Lang Const. Co., supra.*

Paragraph 4 of the counterclaim (JA 4, AA 5) itself is couched in legal terminology as follows:

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[12] In the Claremont appeal, Dean Kingsley also concluded that the Board "likewise lacks jurisdiction to rule on the correctness of the measure of damages adopted by the Contracting Officer. Since the whole matter of damages (apart from action under Article 9) is outside the express contract language, if follows that the measure of damages is also a question of general law and not a 'dispute . . . *under*' the contract."

> "4. Plaintiff failed to perform the work required by its subcontract with defendant within the time provided for by the subcontract. As a result, defendant has sustained damages in the amount of three hundred thousand dollars ($300,000.00)."

In contrast to Blount's allegations, Troitino set forth substantive matters in his pleadings which provide a tangible foundation for the legal positions taken and legal questions raised.[13]

Accordingly, the order of the court below denying motion for arbitration was correct and it should be upheld for the above mentioned reasons alone.

IV.

For Other Reasons, the Order Should Be Sustained.

(1) Blount really made no showing sufficient under 9 U.S.C., Section 3 for reference to arbitration. Its first motion disclosed a singular lack of specificity and definiteness. At the hearing of the motion before Judge Youngdahl, after Troitino had filed his objections thereto, Blount was still vague. Its demand for arbitration made after service of process on it of Troitino's complaint related to all matters in dispute, transcending Article XIII of the subcontract. Thus it appeared to be a request for submission of everything to arbitration, which has not been accepted. Blount's motion papers spoke of the claims of the parties against each other and that Blount has now determined to submit "the matter" to arbitration (AA 1). No answer to the complaint or claim of Blount was filed in the proceeding prior to the hearing before Judge Youngdahl, nor was even

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[13] Reference to arbitration of Blount's counterclaim in the state of the record in this case would constitute a lack of due process in the Constitutional sense, in view of the restricted "arbitration" clause which would preclude an "award" by arbitrators thereunder.

the subcontract filed in the cause. The motion was denied, with leave to file a *new* one.

On August 3, 1965, Blount filed a supplemental motion to enforce agreement for arbitration and for stay. Blount, however, did not accompany such motion with an answer to the complaint or with its counterclaim. Blount did file three affidavits (JA 10-13).

On August 26, 1965, Blount's supplemental motion came before Judge Jones,[14] who, after listening to extended argument, continued the motion for a still further showing by Blount.[15] The other affidavits dealt with the interstate commerce phase and will be treated *infra*. Requests for admissions, not as to facts, however, provided by the Rules, were filed by Blount and after objections thereto, were denied by Judge McGarraghy who also denied the supplemental motion to enforce agreement for arbitration and for stay, both on November 5, 1965. At that time, Blount had not filed an answer to the complaint nor had it filed its counterclaim. Both were filed on November 15th and simultaneously with motion for rehearing of the motion to enforce arbitration agreement and for stay. Troitino opposed the latter both with statement and points and authorities (AA 7-8). On November 23rd, the motion for rehearing was denied.

Throughout the proceedings below, Blount proceeded casually, with-

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[14] Cf. Jacket entry August 26, 1965.

[15] The affidavit of Frank H. McFadden, one of counsel for Blount, which set forth no facts, but merely self-serving quasi hearsay conclusions, was considered by Judge Jones to be deficient and insufficient and requests for admissions under Rule 36 (confined to facts) identical therewith were denied by Judge McGarraghy as merely conclusionary and not factual. The affidavit did, however, not indicate there were any issues respecting the allegations of Troitino's complaint. Counsel for Troitino stated in open court that the matters referred to were not the issues; that no question of fact referable to arbitration existed with substantiation therefor. It is considered that a substantial showing, including factual matters presented to the court, in open court by counsel, is at least countervailing to an affidavit such as that of Mr. McFadden, which, incidentally, is different from Paragraph 4 of the counterclaim, demanding general delay damages (AA 6).

out real or actual showing of any issue referable to arbitration as required by the arbitration statute. Blount presented its contentions four different times to three different Judges in the court below. None of them was satisfied that the issues involved in the suit or proceeding were referable to arbitration, a requisite under 9 USC 3. Moreover, Blount chose to withhold its answer and counterclaim until after it had failed on three different occasions before three different Judges to make the statutory showing required.

(2) The subcontract (on Blount's standard form) was made in the State of Alabama, where Blount, the last party to sign, executed it (AA 7, 12). Thus, the municipal law of that State is a part of that contract and *prima facie* or presumptively that which the parties intended. The work under both the prime and subcontract was completed and accepted by the District of Columbia long prior to the bringing of Troitino's complaint. There is no provision in Article XIII that arbitration be performed in the District of Columbia. Under Alabama law, an executory agreement to submit a controversy to arbitration may not specifically be enforced. Volume 4, Code of Alabama, recompiled 1958, Title 9-55 (6833): "The following obligations cannot be specifically enforced: * * * an agreement to submit a controversy to arbitration; * * *." See *Tennessee Coal & Iron Co. v. Sizemore*, 258 Ala. 344, 350, 62 So. 2d 459. See also Section 51 of that Title, *supra*, p. 6.

As to the District of Columbia, see *John W. Johnson v. 2500 Wisconsin Avenue, Inc.*, 98 U.S. App. D.C. 8, 231 F.2d 761; *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456, 1 L. ed. 2d 972, 77 S. Ct. 912.

The intention imported into the subcontract both by federal and municipal law was to exclude Blount's counterclaim from Article XIII; and this is in addition to the express exclusion on the face of the subcontract. Accordingly, federal law and the pertinent municipal law are contrary to Blount's contentions and fully sustain the order below.

(3) Although in view of all the foregoing the matter is largely academic, the subcontract is not a transaction involving interstate commerce within the restricted Section 2 of the Federal Arbitration Act.[16] *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 100 L. ed. 199, 76 S. Ct. 273; *John W. Johnson v. 2500 Wisconsin Avenue, Inc., supra; Coles v. Redskin Realty Company*, 184 A.2d 923; *Conley v. San Carlo Opera Company*, 163 F.2d 310; *Tejas Development Company v. McGough Brothers*, 165 F.2d 276; *W. R. Grimshaw Company v. Nazareth Literary and Benevolent Institution*, 113 F. Supp. 564. In *Moseley v. Electronic & Missile Facilities, Inc., et al.* (1963) 374 U.S. 167, 10 L. ed. 2d 818, 83 S. Ct. 1815 (suit on a bond under the Miller Act), the Chief Justice and Mr. Justice Black (concurring) saw fit to leave open four questions:

> "(1) Can a member of the special class of laborers and materialmen which Congress, in the public interest, has protected by fixing the venue for their claims under the Miller Act in a particular federal court deprive himself of that kind of remedy as a condition of his obtaining the employment or the purchase of his materials?
>
> "(2) Can any person, before any dispute has arisen, agree to arbitrate all future disputes he may have and thereby lose his right to go into court to try his claim according to due process of law?
>
> "(3) Can the Arbitration Act, in light of its language and legislative history, be applied to laborers and materialmen or to construction projects subject to the Miller Act?
>
> "(4) Is a construction project, like the one in this case, one 'involving commerce' so as to come within the restricted scope of the Arbitration Act?"

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[16] Troitino's subcontract was for the stonework. While the stone did come from Georgia, it came to rest in the District of Columbia, was set here and remains here. It is a matter of common knowledge that in the construction of almost any building in the District of Columbia, materials, equipment and supplies therefor would come from without. The nature of the use of the highway after construction is immaterial.

V.

Appellant's Brief

Only a few matters in appellant's brief will be further noticed or treated:

Blount's contentions that Federal policy favors arbitration and those pertaining to the asserted effect of the affidavits for Blount are related and may be dealt with together. There are countervailing and prevailing antinomies in addition to those mentioned earlier.

Agreement to arbitrate must rest on a clear, definitive agreement of the parties. The intention of parties to submit their disputes outside the courts should be made manifest by plain language, which cannot be implied. The arbitration clause is at once the source and limit of matters to be arbitrated. Whether or not a party is bound to arbitrate, as well as the issues it must arbitrate, is a matter to be determined on the basis of the contract entered into between them, for arbitration is a matter of contract and the party cannot be compelled to arbitrate any dispute he has not agreed so to submit. *United States v. Moorman,* 338 U.S. 457, 462, 94 L. ed. 256, 70 S. Ct. 288; *Atkinson v. Sinclair Refining Co.,* 370 U.S. 238, 8 L. ed. 2d 462, 82 S. Ct. 1318; *Wiley & Sons v. Livingston,* 376 U.S. 543, 11 L. ed. 2d 898, 84 S. Ct. 909; *United States v. Utah Construction and Mining Company, supra; Independent Petroleum Workers v. American Oil Co.,* 324 F.2d 903, aff'd by divided Court, 379 U.S. 130, 13 L. ed. 2d 333, 85 S. Ct. 271, Pet. for reh. den., 379 U.S. 985, 13 L. ed. 2d 579, 85 S. Ct. 639; *International Union v. Benton Harbor Malleable Industries,* 242 F.2d 536, cert. den., 355 U.S. 814, 2 L. ed. 2d 31, 78 S. Ct. 15; *B. Fernandez & Hnos. v. Rickert Rice Mills,* 119 F.2d 809.[17]

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[17] Even in New York, the words "arising under" in an arbitration clause are narrow. *Sinva, Inc. v. Merrill, Lynch, etc.,* 253 F. Supp. 359. In *Marchant v. Mead Morrison Mfg. Co.,* 252 N.Y. 284, 299, 169 N.E. 386, 391, Judge, later Mr. Justice, Cardozo, said that "Our own favor or disfavor of the cause of arbitration is not to count as a factor in the appraisal of the thought of others."

Two affidavits dealt with the interstate commerce aspect. The McFadden affidavit was in support of what was then a motion for summary judgment to enforce arbitration and for stay. At the stage of the case before Judges Jones and McGarraghy an answer to the complaint had not been filed. Affidavits are viewed not only as to what they contain but also what they omit to say in light of the state of the record. The McFadden affidavit denied no allegation in the complaint, which stood unchallenged. No counterclaim had been filed, and, of course, no answer to it. A movant for summary judgment has the burden of establishing entitlement thereto and even if there were doubt the motion would be denied. Here the McFadden affidavit was conclusionary legally and not on personal knowledge concerning the operative facts as is required under Rule 56 (e), FRCP. A lawyer's swearing to "issues" in the case of his client results in no advantage over statements to the contrary in open court by opposing counsel.[18]

Reliance by Blount on *United States v. Callahan Walker Construction Company*, 317 U.S. 56, is misplaced. The decision there did not involve interstate commerce under the Federal Arbitration Act but an equitable adjustment under a contract with the United States for a change under the contract. The Court said that what constitutes an equitable adjustment is not always a question of law and in that instance involved only factual matters.[19]

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[18] Moreover, Blount, in its motion papers; its answers to Troitino's interrogatories; in the McFadden affidavit; its counterclaim, and in its brief in this Court, p. 9, — a still further makeweight — varied considerably in its statements concerning its breach of contract delay damages, particularly in the light of Articles III (c) and XV (e) of the subcontract.

[19] See *Bruce Construction Corporation v. United States*, 163 Ct. Cls. 97, 324 F.2d 516, *Keco Industries, Inc. v. United States*, *supra*; *United States v. Pickett's Food Service* (5th Cir.) ___ F.2d ___, 11 CCF 80432; see also "Confusion in the Concept of Equitable Adjustments in Government Contracts," Spector 22 FBJ 5; "Confusion in the Concept of Equitable Adjustments in Government Contracts: A Reply," McBride, 22 FBJ 235.

Reference by Blount to the *Greathouse* case (now on appeal in this Court, No. 20036) is also misplaced. Judge Youngdahl, before whom Blount's motion for arbitration in *Greathouse* came, expressly differentiated the opposition in the two cases in his order of July 20, 1965 denying Blount's motion (JA 7).

CONCLUSION

For the reasons hereinabove given, the appeal should either be dismissed or affirmed.

Respectfully submitted,

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CONTENTS OF APPELLEES' APPENDIX

APPELLEE'S APPENDIX

[Filed June 15, 1965]

[DEFENDANT'S] POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO ENFORCE AGREEMENT FOR ARBITRATION AND FOR STAY OF FURTHER PROCEEDINGS PENDING ARBITRATION

* * *

The parties hereto have for some time been attempting to reach a basis for settlement of their claims against each other, growing out of the contract between them. The instant suit has been filed prematurely, prior to any definitive termination of these discussions, and before any decision had been reached as to whether the case would have to be arbitrated. Defendant has now determined to submit the matter to arbitration, and written demand for arbitration was mailed to plaintiff (and his counsel) on June 9, 1965; copy of the demand is attached as Exhibit A hereto.

* * *

/s/ Frederick A. Ballard
Frederick A. Ballard
912 American Security Building
Washington, D.C. 20005

Attorney for Defendant

Exhibit A to Points and Authorities of Defendant in Support of Motion To Enforce Agreement for Arbitration and for Stay of Further Proceedings Pending Arbitration, Filed July 15, 1965.

bcc: Mr. Frank H. McFadden
Mr. Fred Ballard

June 9, 1965

Troitino Construction Company
Post Office Box 2929
Asheville, North Carolina

Reference: Subcontract No. 535-11
Southwest Freeway Inner Loop
Washington, D. C.

Gentlemen:

Pursuant to Article XIII of Subcontract No. 535-11, dated April 20, 1961, between your company and Blount Brothers Construction Company, we hereby demand arbitration of all disputes between the parties thereunder.

Our counsel will be in touch with your counsel promptly with respect to naming the arbitrators.

Very truly yours,

BLOUNT BROTHERS CORPORATION

John A. Caddell
Vice President

JAC/mls
VIA REGISTERED MAIL
RETURN RECEIPT REQUESTED

cc: Travelers Indemnity Company
1710 "H" Street, N.W.
Washington, D.C.

Travelers Indemnity Company
Hartford, Connecticut

Mr. Kahl K. Spriggs
504 Southern Building
Washington, D. C.

[Filed June 22, 1965]

PLAINTIFF'S POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION TO ENFORCE AGREEMENT FOR ARBITRATION AND FOR STAY

Plaintiff opposes the motion of defendant to "enforce agreement for arbitration and for stay of further proceedings pending arbitration," upon the following grounds:

1. The Motion is Improvident, and There is no Showing Made Warranting the Relief Sought.
2. Plaintiff has not Agreed to Submit the Issues Raised in the Complaint to Arbitration, and There is no Showing That it Has.
3. At Common Law, which Prevails in the District of Columbia with Respect to Arbitration, an Executory Agreement to Arbitrate is Not Enforceable.
4. The Subcontract is not a Transaction Involving Commerce Within Section 2 of the Federal Arbitration Act.
5. In View of the Provisions of the Subcontract, Arbitration Upon the Issues Raised by the Complaint Would Result in a Lack of Due Process Under the Due Process Clause of the Fifth Amendment, As Well As Prejudice to Plaintiff.

* * *

The standard arbitration clause of the American Arbitration Association is as follows:

> "Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration in accordance with the Rules of the American Arbitration Association, and judgment upon the award rendered by the Arbitrator(s) may be entered in any Court having jurisdiction thereof."

* * *

/s/ Kahl K. Spriggs
Kahl K. Spriggs
John F. Myers
504 Southern Building
Washington, D.C. 20005

Attorneys for Plaintiff

[Filed November 15, 1965]

MOTION TO BRING IN ADDITIONAL PARTY PURSUANT TO COUNTERCLAIM

Defendant, Blount Brothers Construction Company, moves for an order pursuant to Rule 13(h), F.R.C.P., bringing in as a party defendant herein the Travelers Indemnity Company, a Connecticut corporation, doing business in the District of Columbia at 1710 H Street, Northwest. The grounds for the motion are as follows: The basis for the counterclaim is that defendant Blount Brothers Construction Company has been damaged by the delay of plaintiff in performing a subcontract between plaintiff and defendant, under defendant's prime contract with the District of Columbia for construction of a project known as the Southwest Freeway. Plaintiff furnished to defendant a performance bond (copy of which is attached to defendant's Answer and Counterclaim as Exhibit B), executed by the Travelers Indemnity Company as surety, guaranteeing the timely performance of the subcontract. Accordingly, in order to insure complete relief under the counterclaim, the presence as a party defendant of the surety is necessary.

Jurisdiction of the surety can be obtained and its joinder will not deprive the court of jurisdiction of the action.

/s/ Frederick A. Ballard
Frederick A. Ballard
912 American Security Building
Washington, D.C. 20005

Attorney for Defendant

[Filed November 15, 1965]

[DEFENDANT'S] ANSWER AND COUNTERCLAIM

* * *

COUNTERCLAIM

1. Plaintiff is an individual, a citizen of North Carolina, doing business as Troitino Construction Company. Defendant and counterclaimant, Blount Brothers Construction Company, a Delaware corporation, was of August 31, 1962, merged into Blount Brothers Corporation, also a Delaware corporation. The amount in controversy under the instant counterclaim is in excess of ten thousand dollars, exclusive of interest and costs.

2. On or about April 20, 1961, plaintiff and defendant entered into a subcontract under a prime contract between defendant and the District of Columbia for construction of a project known as the "Southwest Freeway, Inner Loop — Center Leg Connection, Railroad Structures and Roadways," whereby plaintiff agreed to perform the stone and masonry work required under defendant's prime contract. Copy of the subcontract between plaintiff and defendant is hereto attached as Exhibit A.

3. Plaintiff furnished to defendant a performance bond, executed on behalf of plaintiff by the Travelers Indemnity Company, a Connecticut corporation, copy of which bond is attached hereto as Exhibit B.

4. Plaintiff failed to perform the work required by its subcontract with defendant within the time provided for by the subcontract. As a result, defendant has sustained damage in the amount of three hundred thousand dollars ($300,000.00).

WHEREFORE, defendant demands judgment against plaintiff in the sum of three hundred thousand dollars ($300,000.00), plus interest and costs, including attorneys' fees.

Frederick A. Ballard

Frank H. McFadden

Attorneys for Defendant

[Filed November 16, 1965]

ORDER TO BRING IN ADDITIONAL PARTY DEFENDANT

On consideration of the Answer and Counterclaim filed herein on behalf of defendant, Blount Brothers Construction Company, and of the motion of said defendant to bring in as an additional party pursuant to the counterclaim the Travelers Indemnity Company, and it appearing that the presence as a party defendant to the counterclaim of Travelers Indemnity Company is necessary in order to insure complete relief under the counterclaim; and it appearing further that jurisdiction of Travelers Indemnity Company can be obtained and that its joinder will not deprive the court of jurisdiction of the action, it is by the court this 16 day of November, 1965,

ORDERED that the said motion to bring in additional party is granted and the Travelers Indemnity Company, doing business in the District of Columbia at 1710 H Street, Northwest, is hereby brought in as a party defendant to the Counterclaim pursuant to Rule 13(h) of the Federal Rules of Civil Procedure.

/s/ McGarraghy, J.
District Judge

[Filed November 18, 1965]

PLAINTIFF'S STATEMENT OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION FOR REHEARING OF ITS MOTION TO ENFORCE ARBITRATION, ETC.

Plaintiff opposes defendant's motion for rehearing of its motion to enforce arbitration agreement and for stay.

Preliminary Statement

This is the fourth time defendant has raised the matter, and before three Judges of this Court. Aside from postulating erroneous and self-serving assumptions which have not been accepted, and contrary to defendant's own form of subcontract, hereinafter briefly mentioned, defendant's actions in this Court are inconsistent with its motion. Defendant has not only filed a counterclaim in this case, but also moved the Court to bring in a third-party defendant on such counterclaim, representing that in order to insure complete relief under the counterclaim, the presence as a party defendant of the surety, The Travelers Indemnity Company, was necessary. Of course, the Travelers is not bound to forego in this Court its defenses to any claim on its bond.

The counterclaim seeks damages in the amount of $300,000.00, far in excess of the amount of plaintiff's claim. Thus, at one and the same time defendant is moving to stay the hand of the Court and of the plaintiff in this case and seeking actively to prosecute its counterclaim and to bring in an additional party, plaintiff's surety, which was not a party to the subcontract.

Moreover, and even more importantly, plaintiff brought an action in this Court, Civil Action No. 1807-65, styled District of Columbia to the use of Joseph Troitino, etc., originally against Blount's surety, United States Fidelity and Guaranty Company, on another subcontract, namely, the Potomac Sewerage Pumping Station project, the instant suit being on what is known as the Southwest Freeway project. In that case, counsel for United States Fidelity and Guaranty Company, who is the same counsel appearing for Blount in the instant case, represented to the Court (on oral hearing of motion to dismiss because Blount was not joined as a party defendant) that Blount desired to file a counterclaim, not arising out of that subcontract, but out of the subcontract on the Southwest Freeway project. Judge Holtzoff dismissed the complaint with leave to amend and the amended complaint named as an additional party defendant,

Blount Brothers Construction Company. Such defendant has filed the same counterclaim in that case, as it has in this one, and on November 15, 1965, the Court entered an order bringing in Travelers Indemnity Company as an additional party defendant on the counterclaim, on a motion by Blount stating that in order to insure complete relief under the counterclaim, the bringing in of Travelers as a party defendant was necessary.

It is to be observed that the counterclaim in Civil Action No. 1807-65 was permissive; whereas, in the instant action it is compulsory. Defendant by seeking to have itself made a party defendant in that action and in order to file its same counterclaim, voluntarily elected to prosecute it in this Court against Troitino and his surety, Travelers.

* * *

Aside from the limited nature of Article XIII of the subcontract, which was made in the State of Alabama and not enforceable there,* as stated to the Court on the last oral argument herein, defendant's counterclaim is a suit for alleged breach of the subcontract, not only not covered by Article XIII, but also expressly reserved by the defendant itself under Article XV(e) for Court action, there being no provision in the subcontract for damages for delay other than Article III (c), which is limited to deduction from the subcontract price. The subcontract work was completed by Troitino and the counterclaim does not even allege any damages under Article XV (a) and (b). Thus, defendant is pursuing its rights at law <u>outside</u> of the subcontract, which are expressly stated to be cumulative under Article XV (e).

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* Volume 4, Code of Alabama, Recompiled 1958, Title 9-55 (6833): "The following obligations cannot be specifically enforced: * * * An agreement to submit a controversy to arbitration; * * *"

AA 9

Exhibit A to [Defendant's] Supplemental Motion To Enforce Agreement for Arbitration [Filed August 3, 1965]

BLOUNT BROTHERS CONSTRUCTION COMPANY
HEAVY CONSTRUCTION DIVISION

MONTGOMERY, ALABAMA

Subcontract No. 535-11

SUBCONTRACT

—WITH—

TROITINO CONSTRUCTION COMPANY Amount $ 313,336.40 (Approximate)

This agreement entered into this 20th day of April, 19 61, by and between BLOUNT BROTHERS CONSTRUCTION COMPANY, of Montgomery, Alabama, hereinafter called Contractor, and Troitino Construction Company of Asheville, North Carolina, hereinafter called Subcontractor.

WITNESSETH that, WHEREAS Contractor has heretofore entered into a General Contract with the District of Columbia Department of Highways of Washington, D. C., hereinafter called the Owner, to furnish all labor and materials and perform all work required for Federal Aid Interstate Project No. I-IG-95-1(6)2, Southwest Freeway, Inner Loop - Center Leg Connection, Railroad Structures and Roadways, in strict accordance with the specifications, schedules and drawings prepared by the District of Columbia Department of Highways, which are made a part of said General Contract, and which are now made a part of this subcontract insofar as they apply, and the parties hereto desire to contract with reference to a part of said work.

NOW, THEREFORE, in consideration of the mutual agreements herein contained, it is agreed as follows:

* * *

Article III — (a) Subcontractor shall begin work as soon as instructed by Contractor and shall carry on said work promptly, efficiently and at a speed that will not cause delay in the progress of Contractor's work or other branches of the work carried on by other subcontractors. Contractor may, from time to time, reschedule the order of the work to be performed and may require Subcontractor to prosecute in preference to other parts of the work such part or parts as Contractor may specify.

(b) Subcontractor, at Contractor's request and at the time specified in such request, shall submit to Contractor progress, procurement and man-hour completion schedules, satisfactory in form and content to Contractor, and upon Contractor's acceptance of the schedules, shall prosecute the work in accordance therewith, subject to the provisions of Article III(a) above.

(c) Any damages for delay caused by Subcontractor, including actual damages which Contractor sustains or for which Contractor is liable to others, and including any damages, liquidated or otherwise, for which Contractor is liable to Owner, or as results of Subcontractor's failure to comply with progress schedules required by Article III(b) above, shall be deducted by Contractor from the agreed price for said work as liquidated damages and not as a penalty; subject, however, to the option of Contractor to terminate said employment for default as herein elsewhere provided.

(d) Contractor shall not be liable to Subcontractor for delay to Subcontractor's work by the act, neglect or default of the Owner or Owner's representative, or by reason of fire or other casualty, or on account of riots or strikes, or other combined action of the workmen or others, or on account of any acts of God, or any other cause beyond Contractor's control, or any circumstances caused or contributed to by any subcontractor or any other party performing a part of the work; but Contractor will cooperate with Subcontractor to enforce any just claim against the Owner or Owner's representative for delay, provided Contractor incurs no extra expense in connection therewith.

(e) Should Subcontractor be delayed in his work by Contractor, then Contractor shall owe Subcontractor therefor only an extension of time for completion equal to the delay caused and then only if written claim for delay is made to Contractor within forty-eight (48) hours from the time of the beginning of the delay.

Article XIII — If any question of fact shall arise under this contract and there is no provision for settlement in the General Contract, then either party hereto may demand an arbitration by reference to a board of arbitration, to consist of one person selected by Contractor, and one person selected by Subcontractor, and these two to select a third; and in case these two shall fail to select a third within three days, either party hereto shall have the right to request that the third arbitrator be named by the American Arbitration Association. In case either party fails to name an arbitrator within three days after requested to do so, then the other party shall have the right to request the American Arbitration Association to name an arbitrator to represent the party so failing to name one. The written decision of any two of this Board shall be final and binding on both parties hereto. Each party shall pay one-half of the expense of such reference.

* * *

Article XV — (a) Should Subcontractor at any time breach this agreement or fail to prosecute the said work with promptness, diligence and efficiency or fail to perform any of the requirements hereof, Contractor may without notice (or if notice be required by Law, then after twenty-four (24) hours' written notice either by registered mail addressed to Subcontractor at Post Office Box 2929, Asheville, North Carolina, or by posting in some conspicuous place on the job) proceed as follows:

1. Provide such materials, supplies, equipment, machinery, tools, labor and supervision as may be necessary to complete said work, pay for same and deduct the amount so paid from any money then or thereafter due Subcontractor, or

2. Withhold payment of any estimate in the event Subcontractor be in default under this subcontract or any provision hereof, other provisions of this subcontract notwithstanding.

3. Terminate the employment of Subcontractor, enter upon the premises and take possession, for use in completing the work, of all the materials, supplies, tools, equipment, machinery and appliances of Subcontractor thereon and complete the work, or have same completed by others, and be liable to Subcontractor for no further payment under the agreement until final payment is due, and then only if and to the extent that the unpaid balance of the amount to be paid under this subcontract exceeds the expense of Contractor in finishing the work.

(b) If the amount expended by Contractor under "1" above, or the cost of completing the work under "3" above, exceeds the unpaid balance of subcontract price herein stated, Subcontractor shall pay Contractor such excess upon demand.

(c) Should Subcontractor at any time fail to pay for all labor, services, materials and supplies, machinery, appliances, tools and all other things used by Subcontractor in said work when due, Contractor, at its option, may pay for same and charge to Subcontractor; or may, at its discretion, and with the consent of Subcontractor, pay at any time claims for labor, materials and supplies and all other things used in the work.

(d) Should Subcontractor default in any of the provisions of this subcontract and should Contractor employ an attorney to enforce any provision hereof, or to collect damages for breach of the subcontract, or to recover on the bonds mentioned in Article XIV above, Subcontractor and its surety agree to pay Contractor such reasonable attorneys fee as Contractor may expend therein.

(e) The rights and remedies granted to Contractor under this article and those granted to the Contractor pursuant to the other provisions of this subcontract shall be cumulative and are not intended to be in lieu of any legal right or remedy which Contractor may have against Subcontractor for breach of this subcontract or default hereunder afforded by state or federal law.

AA 11

Exhibit B to Answer and Counterclaim

[Filed November 5, 1965]

PERFORMANCE BOND

KNOW ALL MEN BY THESE PRESENTS, that the undersigned, Troitino Construction Company, Asheville, North Carolina as principal, and The Travelers Indemnity Company, Hartford, Connecticut, as surety, are held and firmly bound unto BLOUNT BROTHERS CONSTRUCTION COMPANY, of Montgomery, Alabama, in the full and just sum of Three hundred thirteen thousand, three hundred thirty-six and 40/100 - Dollars ($ 313,336.40), for the payment of which sum, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

THE CONDITION OF THIS OBLIGATION IS SUCH, that whereas the principal entered into a written contract dated October 23, 1961, with said BLOUNT BROTHERS CONSTRUCTION COMPANY, which said contract, identified as Subcontract No. 535-11, is attached hereto and is by reference made a part hereof.

NOW, THEREFORE, if the principal shall well and truly perform all the undertakings, covenants, terms, conditions and agreements of said contract, during the original terms of said contract and any extensions thereof that may be granted by BLOUNT BROTHERS CONSTRUCTION COMPANY, with or without notice to the surety, and during the life of any guaranty or maintenance required under said contract, and shall also well and truly perform all the undertakings, covenants, terms, conditions and agreements of any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the surety being hereby waived, then, this obligation to be void; otherwise, to remain in full force and effect.

IN WITNESS WHEREOF the above bound parties have executed this instrument under their several seals this 23rd day of October, 1961, the name and corporate seal of each corporate party being hereto affixed by these presents, duly signed by its undersigned representative, pursuant to authority of its governing body.

In presence of:

Louis M. Manna
Beckley, W. Va.
(Address)

Bernice M. Black
Beckley W/Va.
(Address)

TROITINO CONSTRUCTION COMPANY
(Principal)

By Joe Troitino

Title Sole Owner

THE TRAVELERS INDEMNITY COMPANY
(Surety)

By James E. Songer

Title ~~Attorney-in-Fact~~

[Filed November 29, 1965]

ANSWER OF PLAINTIFF TO COUNTERCLAIM

First Defense

The counterclaim fails to state a claim upon which relief may be granted herein against plaintiff.

Second Defense

1. Plaintiff admits he is an individual and a citizen of North Carolina, doing business as Troitino Construction Company. Plaintiff is without knowledge or information as to whether defendant merged into Blount Brothers Corporation. Plaintiff denies the amount in controversy under the alleged counterclaim is in excess of $10,000.00.

2. Plaintiff denies it entered into the subcontract annexed to the counterclaim as Exhibit A on April 20, 1961, and states that such subcontract was not entered into until on or after October 23, 1961, the date referred to in the copy of the bond attached to the counterclaim as Exhibit B. Plaintiff further says that such written subcontract was made on or after October 23, 1961 in the State of Alabama, where defendant, which was the last party to execute the same, signed it and transmitted the subcontract to plaintiff.

3. Plaintiff admits the execution and delivery of the bond annexed to the counterclaim as Exhibit B.

4. Plaintiff says the statement in the first sentence of paragraph 4 of the counterclaim that he "failed to perform the work required by its [sic] subcontract with defendant within the time provided for by the subcontract," does not constitute an allegation of fact and is a legal conclusion, and is so vague and indefinite as not to require an answer by him. Alternatively, plaintiff denies each and every statement or assertion in paragraph 4 of the counterclaim. Plaintiff further says that if such first sentence alleges any agreement between the parties other than the writ-

ten subcontract made on or after October 23, 1961, that there was neither a specified period for performance of such work in any such agreement nor any agreement therein respecting any liability for delay damages on the part of plaintiff. If defendant's assertion in the first sentence of paragraph 4 refers to a subcontract made on or after October 23, 1961, then plaintiff says that such statement constitutes a conclusion of law and defendant has not only waived any right or claim to any alleged delay damages, but also is estopped to assert the same by reason of its conduct as set forth in the third, fourth and fifth defenses hereto, which are made a part hereof.

Third Defense

1. Plaintiff alleges that the prime contract between defendant and the District of Columbia Department of Highways for the project referred to in paragraph 2 of the counterclaim was made in November, 1960, and that defendant within a few days thereafter received from the District of Columbia notice to proceed with the performance thereof.

2. Defendant, although knowing of the necessity and urgency of obtaining the stone referred to in bid items 19, 31, 32 and 33 of the prime contract, did not take steps to obtain the same until the Spring of 1961. That defendant tentatively made arrangements to perform stone work on the project with plaintiff, but did not make any firm subcontract until on or after October 23, 1961. If such tentative arrangement with plaintiff legally constituted a subcontract, not only was there no agreement between the parties respecting damages for delay therein, but also defendant was informed by plaintiff in the Fall of 1960 that if the stone was not then ordered and arranged for, delay would ensue in the delivery and setting thereof.

3. Plaintiff further alleges that defendant undertook directly to deal with the producing stone quarry, namely, Davidson Granite Company, and, throughout the course of the work of plaintiff, dealt directly with such quarry. Plaintiff further says that the course of conduct on the

part of the defendant from the date of its prime contract with the District of Columbia to the completion thereof was such as to constitute a waiver of or estoppel against any claim or demand against the plaintiff herein.

Fourth Defense

Plaintiff says that defendant made a number of requests to the District of Columbia for extensions of time for the performance and completion of the work under its prime contract for causes of delay other than as asserted in its counterclaim herein and attributable to causes and reasons other than any delay on the part of plaintiff in performing his work, and that defendant has received extensions of time from the District of Columbia on account of such requests, reducing the over-run of prime contract performance time by a substantial number of days. Plaintiff further states that the District of Columbia has not yet acted on certain of those requests of defendant for contract time extensions, and that if such requests are granted, the time of performance of the contract would be extended to a date beyond that on which the contract was completed and accepted by the District of Columbia, resulting in no damages to defendant. Plaintiff says that the conduct of the defendant both with respect to complaints regarding delays in performance and requests for extensions of time not related or attributable to any acts or omissions on the part of plaintiff have been such as to estop the defendant from asserting any claim for delay damages against plaintiff herein.

Fifth Defense

Plaintiff says that if the subcontract between the parties is that which was entered into on or after October 23, 1961, then delay damages respecting plaintiff's work were not then within the contemplation of the parties, or intended by them; alternatively, plaintiff says that any dam-

ages for delay may not exceed the amount which may be found to be due or owing plaintiff under his complaint.

/s/ Kahl K. Spriggs
Kahl K. Spriggs
504 Southern Building
Washington, D.C. 20005

Attorney for Plaintiff

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 19,889

BLOUNT BROTHERS CONSTRUCTION COMPANY,

Appellant,

v.

JOSEPH TROITINO,
doing business as TROITINO CONSTRUCTION COMPANY,

Appellee.

TROITINO'S ANSWER TO BLOUNT'S PETITION FOR REHEARING

The statement in the opening paragraph of Blount's Petition for Rehearing that three other divisions of this Court have recently decided the *identical issue* the other way is untenable. Other statements in Blount's petition are not sustainable, as will be made manifest.

I

There Was No "Law of the Case"; Hence, the Court Did Not Depart From It.

The question of jurisdiction is always open. It is the continuing duty of courts generally to determine whether they have jurisdiction before proceeding further. The action of a panel of this Court in an intermediate step in this appeal (motion for summary *affirmance*) does not and did not foreclose dismissal by the Court on final hearing upon an express motion to dismiss for lack of jurisdiction (on several grounds) made by Troitino in his brief. Blount, in reality, recognizes that in its petition.

The assertion by Blount it assumed that *res judicata* had resulted from denial of motion for summary affirmance, and so did not argue the matter, will not hold water. Troitino made the motion in the beginning of its brief; Blount had full opportunity to respond to it in a reply brief, and chose not to do so.

As to Blount's comments concerning *Shanferoke and Baltimore Contractors,* see Troitino's brief, pages 10 to 13; *Morgenstern Chemical Company v. Schering Corporation,* 181 F.2d 160; *Lummus Company v. Commonwealth Oil Refining Company,* 297 F.2d 280.

Blount appears to misconceive the nature and posture of this case both in the court below and here. Thus it attempts, although with a singular lack of explication, to equate as identical, *Troitino* with *Travel Consultants* and *Carey*.

Troitino's suit was an action at law for damages for breach of contract, i.e., failure to pay amount said to be due from Blount on a completed and accepted subcontract. Blount did not file an answer to the complaint until its motion "to enforce arbitration agreement and for stay * * *" and its supplemental motion had been heard several times before different Judges below and had been denied. Blount had not

made the requisite showing under 9 USC 3 for a stay.[1] There was not only no issue referable to arbitration respecting Troitino's complaint shown by Blount, but also it clearly appeared by Blount's own counsel's affidavit (JA 11-12) that the only matter Blount wished to arbitrate was its own counterclaim for alleged breach of subcontract delay damages — not even before the court below until ten days after Judge McGarraghy had denied the motion. There was no dispute of material facts set forth in Troitino's complaint.

If Blount's motion for rehearing, made one day after it filed its counterclaim, and before reply by Troitino, brought in the counterclaim for consideration respecting the rehearing motion, then Blount was in the position of asking the court to stay itself from proceeding in court on the counterclaim. In an analogous case, *Turkish State Railways Administration v. Vulcan Iron Works* (C.A. 2), 230 F.2d 108, the Court said:

> 'It will be seen that the rule can have no application to the case before us. For here there is no equitable defense or counterclaim to support the fiction that the power of a court of equity has been invoked by a defendant to restrain the prosecution of a suit at law against him. On the contrary it is the plaintiff here which has asked the court to stay the trial of the first three counts of its own complaint while granting the relief asked for in the fourth. What it asked was no more than the hearing and determination of its fourth count prior to the first three. This was a mere procedural order in the only suit pending, actual or fictional. There was here not even the shadow of a chancellor being asked to stay an action at law nor any semblance of a stay being sought against anyone but the plaintiff. Moreover to suggest that a plaintiff may in-

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[1] Blount failed to recognize the difference between the authority of court under Sections 3 and 4 of that Act. Congress was careful under Section 4 to preserve both due process and jury trial in the Constitutional sense.

> voke a chancellor's aid to enjoin himself from prosecuting his own lawsuit is indeed novel doctrine, too unrealistic for serious consideration.
>
> "The appeal will be dismissed."

In *Travel Consultants*, the suit of Management, plaintiff, was in equity. The counterclaim of Travel Consultants was legal, although part of its defense to the suit was equitable. The arbitration clause was in the broad form recommended by the American Arbitration Association. Travel Consultants also moved the trial court for a preliminary injunction, and Management asked for a stay of the counterclaim pending arbitration. Findings of fact and conclusions of law were made below (themselves showing sufficient distinguishment from Troitino's case), and a single order was entered granting stay on Travel Consultants' second defense and counterclaim, and denying its motion for preliminary injunction. From the single order of stay and denial of injunction, the appeal was taken.

All the court below did in Troitino's case was to deny Blount's motion — in substance and effect a motion for summary judgment, which the Supreme Court said, in *Switzerland Cheese*, decides nothing. It was simply another step in the case. [2]

Blount says (page 3) that arbitration cases are *sui generis* in respect to appealability. That is what this Court said and held in *John Thompson Beacon Windows*. The United States Arbitration Act did create a unique statutory remedy. [3]

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[2] Blount also misconceives the applicability of the summary judgment phase of *Switzerland Cheese*, and the setting in which it was cited by the Court in the instant case.

[3] Blount again fails to note the difference between Sections 3 and 4 of the Act. Moreover, Blount's argument defeats itself; for if arbitration appeals are *sui generis*, they must not be within 28 USC 1292 (a) (1).

Carey v. Carter, cited by Blount, was a labor arbitration case arising under Section 301(a) of the Labor-Management Relations Act. The distinction regarding appealability of orders granting or denying arbitration thereunder and of those under the Arbitration Act was pointed out in *Goodall-Sanford v. United Textile Workers*, 353 U.S. 500, 1 L. Ed. 2d 1031, 77 S. Ct. 920. Blount also says that if the case has to be tried to a court or jury, then the agreement of the parties to arbitrate (in order to avoid the expense and delay involved in such a trial) has been violated beyond repair by later appeal after final decision on the merits.[4]

In view of *J. P. Greathouse Steel Erectors, Inc. v. Blount Brothers Construction Company*, No. 20082, decided by this Court on February 8, 1967, interpreting the same "arbitration" clause of Blount's form of subcontract, as is in the subcontract here, Blount is scarcely in position to make such contention.

As the Court said in *Lummus, supra* (297 F.2d 80, 86):

> "The Supreme Court said in Baltimore Contractors, 348 U.S. at 181, 75 S. Ct. at 252, that the provisions of § 1292 (a) (1) with respect to injunctions sprang 'from a developing need to permit litigants to effectually challenge interlocutory orders of serious, perhaps irreparable, consequence.' An order staying or refusing to stay an arbitration pending judicial inquiry into arbitrability does not rise to that level, the only prejudice from the former is a possibly needless trial of the preliminary issue and from the latter an arbitration that may be held void when the time comes for confirmation of the award. Unpleasant as such consequences may be, they scarcely seem to have been what Congress had in

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[4] The evils of piecemeal appeals are illuminated by this one. At Blount's instance and because of the pendency of this appeal, Troitino has been stayed below in CA No. 1807-65, CA No. 1253-65, and CA No. 3077-65 (suit against Blount and its surety on their payment bond on the Southwest Freeway Project) from discovery, thus unduly extending the delay in having his day in court.

mind when it established what is now 28 U.S.C. § 1292(a)(1) as an exception to the general rule of finality in Federal appellate procedure. * * *"[5]

Part II of the petition has already been answered.

Respectfully submitted,

Kahl K. Spriggs
John F. Myers
504 Southern Building
Washington, D. C. 20005
Attorneys for Appellee

CERTIFICATE OF SERVICE

I certify that copy of the foregoing Answer to Petition for Rehearing was mailed, on the 8th day of March, 1967, postage prepaid, to Frederick A. Ballard, 912 American Security Building, Washington, D. C. 20005, Attorney for Appellant.

Kahl K. Spriggs

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[5] In the traditional injunction case, a bond must be given protecting the party preliminarily enjoined from the loss, cost and expense resulting from the wrongful obtaining thereof.